Supreme Court, U.S.
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(19)

No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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February 23, 2007

PETITION FOR A WRIT OF CERTIORARI FILED: APRIL 7, 2006
CERTIORARI GRANTED: JANUARY 12, 2007

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CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

No. CV 2003 004661

LORETTA LAWSON AND LISA WATSON,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION;
AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants.

APPEARANCE AND EXECUTION DOCKET

DATE	DOCKET ENTRY
4/18/03	Complaint (Civil Cases) 100.00Pd
5/29/03	Amended Complaint
	* * * * *
7/2/03	Notice of Removal: Philip Morris USA Inc.
7/22/04	Notice of Withdrawal of Lead Plf Loretta Lawson: Plf Loretta Lawson
7/22/04	Motion to Dismiss Loretta Lawson
	S Gene Cauley

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

Case No. 4:03-CV-00519-GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS, INCORPORATED,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
7/2/03	1	NOTICE of Petition for Removal from Pulaski County Circuit Court; Case Number: CV03-4661; filing fee of $150.00 pd, receipt #108478 (kjp) (Entered: 07/03/2003)
7/2/03		COMPLAINT (kjp) (Entered: 07/03/2003)
7/2/03		FIRST AMENDED CLASS ACTION complaint with jury demand [0-1] by plaintiff; adding Lisa Watson (kjp) (Entered: 07/03/2003)
7/10/03	2	ANSWER of Philip Morris USA Inc. to plaintiffs' first amended class action complaint with jury demand (rjh) (Entered: 07/11/2003)

* * * * *

8/1/03	4	MOTION by pltfs for remand to Circuit Court of Pulaski County (rjh) Modified on 08/04/2003 (Entered: 08/04/2003)
8/1/03	5	MEMORANDUM OF LAW by pltfs in support of motion for remand to Circuit Court of Pulaski County [4-1] (rjh) (Entered: 08/04/2003)

* * * * *

8/22/03	7	MEMORANDUM IN OPPOSITION TO PLTFS' MOTION FOR REMAND by defts [4-1] (exhb attached) (rjh) (Entered: 08/25/2003)

* * * * *

9/12/03	10	REPLY memorandum of law in support of pltfs' motion to remand to the Circuit Court of Pulaski County, Arkansas [4-1] by pltfs (rjh) (Entered: 09/15/2003)
11/10/03	11	MOTION by pltfs for class certification (rjh) (Entered: 11/12/2003)
11/10/03	12	MEMORANDUM OF LAW by pltfs in support of motion for class certification [11-1] (rjh) (Entered: 11/12/2003)
11/18/03	13	DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF ADDITIONAL Authority regarding pltfs' motion to remand [4-1] (rjh) (Entered: 11/19/2003)

* * * * *

11/20/03		CLERK'S MINUTES: ORAL ARGUMENT before Judge G. Thomas Eisele on Motion to Remand. Court takes under advisement. (Court reporter, Elaine Hinson) (cjw) (Entered: 11/20/2003)

12/11/03	19	ADDENDUM & additional documentation regarding the voluntary agreement in support of defts' memorandum in opposition to pltfs' motion for remand (exhibits #66 through #71) (rjh) (Entered: 12/11/2003)
12/12/03	20	MEMORANDUM OPINION AND ORDER by Judge G. T. Eisele for the reasons & findings stated herein, pltfs' motion for remand to Circuit Court of Pulaski County [4-1] is denied; pltfs' request (contained in Doc #2) for costs & fees is denied; ordered that the controlling question on this case is designated for interlocutory appeal under 1292(b) & pltfs shall have 10 days to file an applic for interlocutory review with USCA; upon filing applic, proceedings in this Ct will be stayed; the date on which defts' resp to pltfs' mot for class cert is due shall be extended; if stay comes into effect, defts' resp to mot for class cert need not be filed until 14 days after Eighth Circuit final action upon pltfs' applic; if pltfs do not seek interlocutory appeal, defts' resp is due no later than 14 days after expiration of the ten day period in which pltfs have to file an applic for interlocutory review (cc: all counsel) (rjh) (Entered: 12/15/2003)
12/30/03	21	NOTICE by plaintiffs of filing petition for interlocutory appeal (dac) (Entered: 12/31/2003)
12/30/03	22	TRANSCRIPT (1 volumes) of proceedings for the following date: 11/20/03 oral argument on motion to remand (dac) (Entered: 12/31/2003)

1/5/04		DOCKETING LETTER: 8 USCA Number 03-8023; petition for permission to appeal pursuant to 28USC section 1292(b) has been filed (dac) (Entered: 01/05/2004)
2/2/04		DOCKETING LETTER: 8 USCA Number 04-1225; petition for permission of Lisa Watson, et al to take an interlocutory appeal is granted (dac) (Entered: 02/02/2004)
		* * * * *
12/5/05	24	MANDATE USCA8 re 1292(b) appeal of 20 Order on Motion for Relief is affirmed in accordance with the opinion of this Court (Attachment: # 1 Opinion) (dac) (Entered: 12/08/2005)
		* * * * *
1/18/06	36	MOTION to Stay Proceedings Pending Supreme Court Resolution of Plaintiffs' Petition for Certiorari 25 by Plaintiffs (rjh) (Entered: 01/18/2006)
1/18/06	37	MEMORANDUM IN SUPPORT filed by Plaintiffs of their 36 Motion to Stay Proceedings Pending Supreme Court Resolution of Plaintiffs' Petition for Certiorari. (rjh) (Entered: 01/18/2006)
1/30/06	38	ORDER IMPOSING STAY that Plaintiffs' Motion 36 is GRANTED and all proceedings in this case are stayed until directed otherwise by this Court; parties are directed to notify the Court upon resolution by the U. S. Supreme Court of the pending Petition for Certiorari. Signed by Judge G. Thomas Eisele on 1/30/06. (rjh) (Entered: 01/30/2006)
		* * * * *

1/30/06	39	CERTIFICATE OF MAILING by the Clerk re 38 Order Staying Case (rjh) (Entered: 01/30/2006)
4/24/06	40	Letter from U. S. Supreme Court, petition for a writ of certiorari was filed on 4/7/06 and placed on the docket 4/10/06 as No. 05-1284 (dac) (Modified entry on 4/26/2006 to correct the placed on docket date to 4/10/06) (bfw). (Entered: 04/26/2006)
4/26/06		NOTICE OF DOCKET CORRECTION: 40 Letter – (modified entry to correct the placed on docket date to 4/10/06) (bfw) (Entered: 04/26/2006)
1/17/07	41	LETTER RESPONSE re 38 Order Staying Case filed by Philip Morris Companies, Inc. and Philip Morris Incorporated. (thd) (Entered: 01/17/2007)
1/17/07	42	NOTICE of Action on Plaintiffs' Petition for Certiorari in Response to 38 Order Staying Case filed by Loretta Lawson and Lisa Watson. (thd) (Entered: 01/17/2007)
1/29/07	43	WRIT of Certiorari is granted by the Supreme Court (dac,) (Entered: 01/30/2007)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
1/28/04	Civil Case Docketed. Dist. Ct. Office: Little Rock, Arkansas
1/28/04	CASE TRANSFERRED – Petition for interlocutory appeal and respondent's answer.
	* * * * *
3/22/04	BRIEF FILED – Brief of Appellant-Loretta Lawson 25 pages w/addendum 10 copies – w/service 3/19/04. [04-1225] [1749375]
	* * * * *
4/19/04	BRIEF FILED – Brief of Appellee – Philip Morris. 13,719 words w/addendum

– 10 copies – w/service 4/19/04. w/disk [04-1225] [1758605]

* * * * *

5/4/04 BRIEF FILED – Reply brief – Lisa Watson, Loretta Lawson. 6 pages 10 copies – w/service 5/3/04. w/diskette [04-1225] [1763671]

* * * * *

11/15/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES William J. Riley, Circuit Judge, John R. Gibson, Circuit Judge, Raymond W. Gruender, Circuit Judge. Marcus Neil Bozeman for Appellants Loretta Lawson, Appellants Lisa Watson. Amy Phillips Rosenthal for Appellees Philip Morris, Appellees Philip Morris. Rebuttal by: Marcus Bozeman. RECORDED. [04-1225]

* * * * *

2/25/05 28(j) citation received and filed from Appellees Philip Morris, Appellees Philip Morris TO COURT [04-1225] [1872104]

8/25/05 THE COURT: William J. Riley, John R. Gibson, Raymond W. Gruender. OPINION FILED by John R. Gibson, Authoring Judge CONCUR by Raymond W. Gruender. PUBLISHED. [04-1225] [1944316]

8/25/05 JUDGMENT: William J. Riley, John R. Gibson, Raymond W. Gruender. The judgment of the lower court is AFFIRMED in accordance with the opinion. [04-1225] [1944318]

* * * * *

9/22/05	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellants Lisa Watson, Appellants Loretta Lawson, w/service 9/21/05. TO COURT [04-1225]
9/29/05	MOTION of amicus curiae, Public Citizen Inc. and AARP, for leave to file brief in support of appellants' petition for rehearing. [04-1225] [1958002], TO COURT w/service 9/28/05
9/29/05	MOTION of amici curiae, Campaign for Tobacco-Free Kids, American Lung Association, American Heart Association, American Cancer Society, and Michael Pertschuk, for leave to file brief in support of petition for rehearing en banc. [04-1225] [1960363], TO COURT w/service 9/29/05
10/3/05	Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Lisa Watson, Loretta Lawson [1955145-1] [04-1225] Response due by 10/13/05
10/7/05	MOTION of aplee, Philip Morris, to strike amici curiae's reliance on extra-record evidence [04-1225] [1961429], TO COURT w/service 10/7/05
10/13/05	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Lisa Watson, Loretta Lawson [1955145-1] [1963028]. Response filed by Philip Morris. w/service 10/13/05 TO COURT [04-1225]

10/21/05	RESPONSE of amicus curiae, Public Citizen, Inc., and AARP, in opposition to appellee motion to strike amici curiae's reliance on extra-record evidence filed by Philip Morris [1961429-1] [04-1225] [1966230]. TO COURT
10/24/05	RESPONSE of amici curiae, Campaign for Tobacco-Free Kids, American Lung Assoc., American Heart Assoc., American Cancer Society, and Michael Pertschuk in opposition to appellee motion to strike amici curiae's reliance on extra-record evidence filed by Philip Morris [1961429-1] [04-1225] [1967595]. TO COURT
11/2/05	JUDGE ORDER: granting amicus motion filed by Public Citizen and AARP for leave to file brief in support of appellant's petition for rehearing [1958002-1] [04-1225] [1970311], denying amicus motion filed by Tobacco-Free Kids, American Lung Assoc., American Heart Assoc., American Cancer Society and Michael Pertschuk for leave to file a brief in support of petition for rehearing [1960363-1] filed [04-1225] [1970311] The brief of amici curiae Public Citizen and AARP is redacted to excise references to briefs filed in other cases which were not included in the record on appeal.
11/2/05	ADDITIONAL PETITION for REHEARING with petition for rehearing en banc. Filed by Amici on behalf of Appellant Public Citizen, Amici on behalf of Appellant AARP, w/service 9/28/05. [1970426], TO COURT [04-1225]

11/18/05	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [1955145-1] filed by Lisa Watson, Loretta Lawson. Petition for panel Rehearing is also denied. [04-1225] Judge Arnold and Judge Bye would grant the petition for rehearing en banc. [1976549] – Published Order.
12/2/05	MANDATE ISSUED [04-1225]

* * * * *

2/27/06	Supreme Court notice received extending time to file petition for writ of certiorari until March 20, 2006. [04-1225]
3/20/06	Supreme Court notice received extending time to file petition for writ of certiorari until 4/17/06. [04-1225]
4/14/06	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on April 7, 2006. Supreme Ct. Case No.: 05-1284 [04-1225] [2035669]
1/16/07	SUPREME COURT order filed granting cert petition. Order filed on 01/12/2007. [3272613] [04-1225]

FEDERAL TRADE COMMISSION
WASHINGTON 25

Bureau of Consultation

DEC 17 1959

Mr. John Vance Hewitt,
Conboy, Hewitt, O'Brien & Boardman,
39 Broadway,
New York 6, N.Y.

Re: Tar and Nicotine Claims

Dear Mr. Hewitt:

To confirm my telephone call of December 15, we wish to advise that all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construed as health claims. No hedging statements, such as taste or sales volume qualifications, will be considered as changing the character of reduction claims. Our purpose is to eliminate from cigarette advertising representations which in any way imply health benefit.

This advice is being disseminated on an industry-wide basis and prompt, simultaneous compliance is urgently requested. Any advertising which is not promptly brought into conformance with this request will be forwarded to other Bureaus looking forward to mandatory procedures. As always, the services of this Bureau are available to cigarette advertisers to confer on proposed advertising.

Please advise this office at the earliest possible time of your client's willingness to make necessary changes in the present advertising of any and all of its brands to comply with this request.

Very truly yours,
/s/
William H. Brain,
Attorney.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant To The
Federal Cigarette Labeling and Advertising Act

June 30, 1968

The 1967 Cigarette Report noted the possibility that cigarette advertisers play important roles as social arbiters. 32/ Exposition if not outright espousal of values has become a prominent feature in current cigarette advertising. Thus,

> Be up-to-date: "You're a part of the right now . . . everything about True says right now". Avoid Alienation: "don't go out without your Lark pack . . . if you're ready to show your pack, the Lark truck will see you" and "you too, join the crowd that smokes the number one in 'good taste' . . . Winston". Persevere: "not long ago if you smoked a reduced tar and nicotine cigarette you were pretty much alone in the world . . . you're not alone anymore" (True).
>
> Be aristocratic: with a connoisseur's eye, Sir Arthur Smith trades his Rolls Royce for a pack of Newports, "The smoothest (taste) that's ever been bred". Chesterfield filters are savored by a wine taster who pronounces their taste "suave, aristocratic, great finesse". Be patriotic (and egalitarian): "afterall, in this country, it's what you are, not who you are that counts" (Century 100s). Be cosmopolitan: "the first filter cigarette to combine rich American taste with handsome European styling" (Half and Half).

Presumably not all the values depicted represent those of the advertisers, e.g. "I bold, brawny, Bob Bevans am a flavor grabber" (L&M). In an L&M commercial taking place aboard ship, the object is to 'see how many [L&M's] are grabbed in the next 50 seconds". In one commercial, the taste of Kents drives a man to larceny but in another delivers him from a career of gambling.

Certain commercials seek to associate their product with a mood. There is the "male whimsy" of Camel advertising, in which men with wondering souls travel from Kilimanjaro to Maine, a mile and yet a mile and a half onward, buying Camels and displaying holes in their soles.

As has been duly noted, cigarette advertising can lend itself to flights from reality.

Marlboro Country continues "traditional male heroic" and moored to the range—"you know when one's missin! Without countin', you know . . . this is Marlboro Country. Where a good colt is as important today as it was a hundred years ago".

There was a time when tribulations befell Salem Country. Replaced by appeals to urbanites ("you can take Salem out of the country . . .") and invaded by the hard sell ("that last cigarette was pretty tasteless—try Salem—taste now—talk later"), Salem Country when last sighted recommenced a definite bucolic upbeat, replete with jodhpur clad damsels with beaux and sorrels.

The Parliament Night People started the year characteristically ("let's find a new place for dinner, OK? . . . Meet the Night People . . . This is their style. They look for atmosphere"), but in the end gave way to sardonic Englishmen, given to having the last word over the mainstream of Parliament cigarettes.

Assuaging Anxiety

For good reason, there is concern that cigarettes are hazardous to health. 33/ Consequently, it is important to advertisers of cigarettes that this concern be allayed. Attempts by cigarette advertisers to dispel worry or anxiety over the health consequences of smoking have met with considerable success. 34/

While recognizing that smoking any cigarette is hazardous, the Surgeon General of the United States has clearly indicated that some cigarettes may be less hazardous than others. Thus, he has stated that "in recent years, the harmful effects of tar and nicotine in cigarette smoke have been the subject of intensive scientific research here and abroad." There is evidence that tar . . . is many times more potent in its cancer-producing properties than any of the substances isolated from it." 35/ A committee appointed by the Surgeon General has concluded that "the preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful are the effects." 36/

Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt cigarette manufacturers to develop less hazardous cigarettes.

On May 15, 1967, Chairman Paul Rand Dixon announced the activation of a Commission cigarette testing laboratory. Testing procedures to be utilized by the laboratory were announced on August 1, 1967. On October 26, 1967, the Commission issued a policy statement which indicated that as a general rule the Commission would not challenge statements or representations of or relating to tar and nicotine content or cigarettes "where they are shown to be accurately and fully substantiated by tests conducted in ac-

cordance with the standardized testing methods and procedures used by the Federal Trade Commission".

Shortly thereafter, on November 22, 1967, the Commission published test results on the tar and nicotine yields of 59 varieties of cigarettes—these included varieties having the greatest sales at the time and those whose labeling or advertising contained tar or nicotine yield statements. Only two varieties made yield claims lower than those published by the Commission and in both instances, the advertisers voluntarily corrected the situation. Unofficial information has been received that the November 22, 1967 test results were carried on the front pages of three out of four of all major daily newspapers in the United States. Many hundreds of thousands of copies were reproduced and distributed by the Public Health Service, the American Cancer Society and other health agencies.

As recently as mid-June of 1968 the Commission released test results of the tar and nicotine yields of virtually all brands marketed domestically, 127 in number. Advertisers now have available for use in their advertising, information concerning the tar and nicotine levels of their and competitive brands. Their use of this information must be factual, fair and not misleading. The ORC-ACS Survey indicated that 62% of all interviewees think that the amount of tar and nicotine should appear both on the cigarette pack and in advertising; an additional 14% think that such information should appear on the pack only. 37/ Since the establishment of the Commission's laboratory, cigarette manufacturers have changed thirty-eight 38/ different varieties of cigarettes with respect to filters, filter overwraps, blends, etc., in an effort to lower tar and nicotine yields. We know of no attempts to produce cigarettes with higher yields.

An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes, e.g., for purposes of this report only, those having 15 milligrams (mg.) of tar or less, have not been extensive thus

far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under – 2%; 16 - 21 mg. – 59%; 22 mg. and over – 39%.

In promoting the above-noted 2% of the market, cigarette advertisers spent 5.5% of their total 1967 advertising budget. During the first two months of 1968, cigarettes with tar content of 15 mg. and under accounted for 2.4% of the market and 7.8% of total advertising expenditures. Perhaps the trend noted in connection with filter and 100 millimeter cigarettes has commenced with respect to low yield cigarettes—manufacturers are spending disproportionately large amounts to promote them with the result that their market share increases each year.

There is every reason to believe that the promotion of low tar and nicotine yield cigarettes can be profitable. As indicated, the Commission released tar and nicotine figures for 59 varieties of cigarettes in late November 1967. These figures indicated that regular and king-sized filter Marvels were lowest in tar and nicotine of the 59. They also indicated that Cascade was lowest among menthol cigarettes. The sales of these three brands rose respectively 382%, 570% and 200% in December 1967, despite the fact that overall cigarette sales declined in December (from November) in 1967, 1966 and 1965. Furthermore, both True and Carlton cigarettes, two well advertised low yield cigarettes, each increased sales 20% that December following publication of Commission figures.

The only brands making tar or nicotine content disclosures in advertising or labeling at the time of the 1967 Cigarette Report were Carlton, True, Marvels, Cascade, King Sano, and Duke of Durham filters. 39/ To these may now be added Domino menthols, Montclair, Silva Thins, and Tryon filters.

As noted in the 1967 Cigarette Report, rather than alert smokers to less hazardous low yield cigarettes, advertisers

sought for the most part to allay smoker anxiety by proclaiming the wonders of their filters. 40/ The PHS Survey revealed a plausible reason for this—the belief is widely held that filter cigarettes are less hazardous to health than nonfilter cigarettes. 41/

Now that the Commission has tested nearly every cigarette on the market, an evaluation of this belief is possible. Concerning the 127 varieties tested, the lowest 34 in tar content are all filter cigarettes and the highest six are all nonfilter cigarettes. However, the nonfilter cigarette ranking 35th lowest in tar is lower in tar than no fewer than 62 other filter cigarettes. Furthermore, it would appear that 95 millimeter, filter Pall Mall spews slightly more tar than king size, nonfilter Pall Mall and that regular size, nonfilter Chesterfield spews slightly less tar than 101 millimeter, filter Chesterfields. 42/ Obviously, the consumer cannot rely on the filter alone.

Nevertheless, the implied safety of a filter ("the mere addition of a filter to a cigarette is, in and of itself, some kind of claim or assurance relating to the health aspects of smoking" 43/) and the miraculous way in which it delivers taste continue to be the advertisers' principal palliative against smoker misgivings. Examples include:

> "the flavor of the world's finest tobaccos through the Kent filter"; "the charcoal granules make the taste better" (Lark); "white filter flavor" (L&M); "a filter cigarette blended with natural flavor fresheners" (Viceroy); "Kool's white filter . . . menthol through a filter."

Some filters are tasty enough to do without tobacco ("You don't even have to light it to like it"—Lucky Strike 100s).

The implication that "filter" equals "comparative safety" can be made more express through depictions of the complicated inner workings of the filter (True, Tempo, Lark, Lucky Strike 100s) or by euphemisms such as "mild", "soft", e.g.

"flavor comes through filtered mild" and "charcoal to soften the taste" (Lucky Strike 100s), "the charcoal filter smoothes the taste" (Tareyton), "air cooled filter, a great light taste" (Carlton).

The Pall Mall advertisements, "Look! it's extra long at both ends. More fine tobacco at one end. And an extra long filter at the other. So it travels the smoke further for greater mildness" and "filter[s] further for a milder smoke", combine several approaches. The implicit assurance of the word "filter" is there, made more explicit, by "an extra long filter" and through the euphemism "travels the smoke further for greater mildness" (emphasis added). The further thought is projected that such euphemistic mildness comes from the longer filter and more tobacco, i.e. "extra long at both ends . . . filter[s] further for greater mildness".

News Release

Federal Trade Commission

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For *RELEASE*: IMMEDIATE, Friday, March 25, 1966

The Federal Trade Commission today announced that it has sent identical letters to each of the nation's major cigarette manufacturers and to Mr. Robert B. Meyner, Administrator of The Cigarette Advertising Code, Inc., in regard to factual statements of tar and nicotine content on labels and in advertising of cigarettes. The text of the letter is as follows:

Gentlemen:

> The Cigarette Advertising Guides promulgated by the Commission in September 1955 provided that no representation should be made that "any brand of cigarette or the smoke therefrom is low in nicotine or tars * * * when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant." On the basis of the facts now available to it, the Commission has determined that a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation of such Guides, or of any of the provisions of law administered by the Commission so long as (1) no collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards, and (2) the statement of tar and

nicotine content is supported by adequate records of tests conducted in accordance with the Cambridge Filter Method, as described in ar. article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, which appeared in the Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964. It is the Commission's position that it is in the public interest to promote the dissemination of truthful information concerning cigarettes which may be material and desired by the consuming public.

By direction of the Commission.

Joseph W. Shea,
Secretary.

REVIEWING PROGRESS MADE TOWARD THE DEVELOPMENT AND MARKETING OF A LESS HAZARDOUS CIGARETTE

HEARINGS
BEFORE THE
CONSUMER SUBCOMMITTEE
OF THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE
NINETIETH CONGRESS
FIRST SESSION

August 23, 24, and 25, 1967

Serial No. 90-52

* * *

THE SECRETARY OF HEALTH,
EDUCATION, AND WELFARE
Washington, January 10, 1967

HON. WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: In response to your letter of November 9, 1964, I am pleased to forward to you a copy of a technical report by the Public Health Service reviewing the significance of the "tar" and nicotine content of cigarette smoke. This report was in the process of preparation at the time of my last letter to you in July and I regret this long delay in putting it in your hands. The report reflects the general considerations which went into the thinking of the committee whose recommendations to the Surgeon General were transmitted to you earlier.

In our opinion, requiring the identification of "tar" and nicotine levels on packages and in advertising, as you have proposed, would be an important step and would result in the progressive reduction of "tar" and nicotine levels because of public demand.

On the basis of available evidence regarding the effects of individual constituents of cigarette smoke, their relationship to the overall hazards of cigarette smoking, and the relative precision regarding measurement techniques, the identification of "tar" and nicotine levels can provide valuable information on overall dosage. In considering any labeling requirement, it would be important that such requirement allow for the addition of other components of cigarette smoke as they are identified as a hazard and when agreement is reached on appropriate measurements to be used.

I strongly support your view that these steps relating to the measurement and labeling of "tar" and nicotine in cigarette smoke are only part of our overall approach to this problem. As you have pointed out, until hazardous substances can be removed from cigarette smoke, the only effective means available to eliminate the health hazards associated with smoking is an educational program designed to inform people of the hazard and encourage people to stop or not to start smoking.

I hope that this letter and the attached technical report will prove helpful.

Sincerely,

JOHN W. CLAIBORNE,
Secretary.

"Public Health Service Technical Report on 'Tar' and Nicotine

"It is clear that the overall risk associated with cigarette smoking increases as the average number of cigarettes consumed per day increases (1). In the studies which have reported other measures of exposure such as pack years, degree of inhalation, and maximum level of cigarette consumption, the same type of relationship holds.

"Hammond (2) has shown that users of high 'tar' and nicotine cigarettes report significantly more of the symptoms that are characteristic of cigarette smokers in general. Gratiani et al (3) have shown that appreciable variations in 'tar' yield of cigarettes may be achieved by changing the pattern of smoking with maximum yield being obtained when puffing is concentrated toward the end of the cigarettes. The effect of tobacco smoke condensate on the mouse skin has been shown by numerous investigators to be dependent on the dose of tar applied to the skin.

"These findings support the existence of a dose-response relationship between exposure to cigarette smoke and the risks most clearly associated with cigarette smoking—lung cancer, chronic obstructive pulmonary diseases, and cardiovascular diseases. Among the factors which may enter into the total exposure are numbers of cigarettes consumed, length of cigarette consumed, pattern of smoking (relative concentration of puffing at beginning, middle, or end of cigarette), frequency and depth of inhalation, and concentration of tobacco smoke which enters the smoker's mouth. The concentration of particulate matter in the mainstream of smoke is reflected in the measurement of the so-called 'tars' in tobacco smoke.

"The epidemiologic evidence on the effect of cigarette smoking on health is based largely on numbers of cigarettes consumed daily as the measure of exposure. That the degree of risk correlates as high as it does with numbers of cigarettes

probably reflect the fact that the various measures of exposure noted above tend to be positively later correlated. Those individuals who smoke many cigarettes, and also, who inhale frequently and deeply, take more puffs, use higher 'tar' and nicotine content cigarettes, and so on.

"Wynder and Hoffmann (4) have shown that the tumorigenicity of cigarette smoke can be reduced by alternation in the cigarette which reduces the 'tar' and nicotine content. They use the term 'indicator' for 'tar' and nicotine content or other measures which reflect this type of gross relationship lacking the identification of specific agents which are responsible for the effect. Bock, Mourn, and Clark (5) have independently shown a similar variation in carcinogenic activity of tobacco 'tar' obtained from different types of cigarettes.

"The ad-hoc group of scientists which reviewed and discussed these data recently at the invitation of the Surgeon General concluded that:

"1. The preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect.

"2. We recommend to the Surgeon General that action be encouraged which will result in the progressive reduction of the 'tar' and nicotine content of cigarette smoke.

"This judgment was arrived at with full recognition of the following:

"1. It is possible for a cigarette to be altered in such a way that its 'tar' and nicotine content is reduced but certain other harmful effects, for example, the effect of the gaseous phase may be increased. Although this is a theoretical possibility, there is no evidence that this has occurred to any serious degree.

"2. The potential benefit to the individual consumer who might shift to a lower tar and nicotine cigarette would be negated if this shift were accompanied by an increase in the

number of cigarettes consumed, or in the length of each cigarette used. There is evidence that, by-and-large, this does not occur, that the shift to low 'tar' and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption (0.7).

"3. Promotion of a low 'tar' and nicotine cigarette might lull the consumer into believing that he could smoke this kind of cigarette without *any* accompanying risk. The presence of the warning label on the package, control over the advertising statements which are permitted, and the continuing educational efforts of public health agencies on this subject should minimize this likelihood."

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* * *

FEDERAL TRADE COMMISSION

CIGARETTES AND RELATED MATTERS

Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing

Notice is hereby given that the Federal Trade Commission will hold a public hearing before the full Commission on November 30, 1968, commencing at 10 a.m., e.s.t. in Room 532, Federal Trade Commission Building, Sixth Street and Pennsylvania Avenue NW., Washington, D.C., at which time and place all interested and affected parties may verbally present data, views, arguments and suggestions relevant to the manner of testing cigarettes to determine their tar and nicotine content and the reporting of the results of such tests. Written data, views, arguments and suggestions will also be made a part of the public record and considered if mailed to Mr. Joseph W. Shea, Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue N.W., Washington, D.C. 20580, on or before November 30, 1968. Persons submitting written presentations exceeding two pages should file 12 copies thereof, and any person desiring to make oral presentation at the hearing on November 30, 1968, should notify the Secretary of the Commission to this effect, with an estimate of the time required for his presentation, not later than November 21, 1968.

The purpose of this hearing is to establish a public record to assist the Commission in determining what action, if any should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method, as described

in an article entitled "Determination of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C.L. Ogg, which appeared in the Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964, to determine tar and nicotine yields of cigarette smoke, and the form in which such results should be expressed in the public interest. This method was specified by the Commission on March 25, 1966, as that to be used to support any factual statements of tar and nicotine content of the mainstream smoke of cigarettes. The public record to be established will assist the Commission in reaching informed determinations with respect to the manner in which its laboratory will be operated, and related questions.

The Commission solicits information and suggestions on the following questions:

1. Whether the butt-length to which test cigarettes are smoked should be 23 mm for nonfilter cigarettes, and the length of the filter and overwrap plus 3 mm for filter cigarettes if such combined length is more than 23 mm;

2. Whether the total particulate matter should be reported on a "wet" or "dry" basis, and if the latter whether the gas chromatography method published by C.H. Sloan and B.J. Sublett, "Moisture Content of the Particulate Phase of Smoke from Filter and Nonfilter Cigarettes," in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz and A.W. Spears report "Determination of Moisture in Total Particulate Matter" published in Tobacco Vol. 162, No. 24, page 32, dated 17 June 1966, should be employed to determine the moisture content;

3. Whether test results should be reported in terms of whole numbers or whole numbers and fractions of milligrams, or a range, or a figure accompanied by the standard deviation with an explanation; and

4. The number of cigarettes to be smoked necessary to produce reliable results, and the size and geographic distribu-

tion of the sample from which such test cigarettes are selected.

Interested persons are invited to submit any information pertinent to these questions or other aspects of the subject.

The data, views, or arguments presented orally or in writing will be available for examination by interested parties at the Federal Trade Commission, Washington, D.C.

Issued: November 3, 1966

By the Commission

[SEAL] JOSEPH W. SHEA
Secretary.

* * *

Before the
Federal Trade Commission

CIGARETTES AND RELATED MATTERS

Methods To Be Employed in Determining
Tar and Nicotine Content

SUPPLEMENTARY OBSERVATIONS FOLLOWING
NOVEMBER 30, 1966 HEARING

The written submissions and oral discussions at the November 30, 1966 Hearing, indicate that many of those concerned had wholly different approaches, technical understanding, working knowledge of the actual use or inherent limitations or required laboratory equipment, or appreciation of the scientific predicates underlying the Cambridge Filter Method whose modification or amplification was being considered.

This Memorandum endeavors in simple form to expose and to clarify the complex technological procedures involved in testing the amount of particulate matter (PM) and nicotine in cigarette smoke. That background must be appreciated by anyone responsible for resolving the various points relating to testing which the Commission has under consideration.

What Is Being Measured?

Whether you call it "tar" or particulate matter (PM), the so-called Ogg Method, employing the Cambridge filter, seeks to determine the non-vapor material in cigarette smoke as generated in the automatic standardized smoking of a cigarette by a machine, not by a human being, according to necessary prescribed standard technical directions.

The weight of the material so drawn in the machine smoking of the cigarette is calculated by prescribed procedures, and the weight of the nicotine in that material is determined.

The amounts of PM and nicotine (per filter pad, with each pad collecting the smoke of five cigarettes, as described later), being measured either absolutely or relatively, are miniscule. They are weight determined from each filter pad to the nearest 0.1 milligram.

A gram is about one twenty-eighth of an ounce. A milligram is one-thousandth of a gram. Put another way, a milligram is 1/28,000 of an ounce. The weighing of the filter pad, which collects PM from five machine-smoked cigarettes, to 0.1 milligram, is a determination to one ten-thousandth of a gram.

To visualize the quantities and the possible weight differences sought to be determined, one might consider a milligram to be equivalent to a barely visible particle of sugar which when dissolved in a quart of water—could not be tasted. A like comparison of a tenth of a milligram to an ounce would be to compare the apparent size of a period sign on a page of the Federal Register to the entire page.

What Is Not Being Measured?

The Ogg Method in fact does not, and cannot, measure either all of the particulate matter (PM), or the total nicotine, from any cigarette. It measures only the PM and nicotine in the volume of smoke puffed through a machine on the standardized method. It does not measure the PM or nicotine in all of the smoke that any cigarette might produce when totally smoked under any and all conditions.

The Ogg Method does not measure the volume of smoke—or the PM or nicotine in the volume of smoke—that any human being will draw from smoking any particular

cigarette. Each smoking characteristic is leveled or averaged out by the standard method.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the PM quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen, to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarette down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

As to butt length to which individuals smoke various types of cigarettes, as will be seen the average is over 30 millimeters, except where the filter prevents smoking down to that length, or where the rapidity of smoking generates a high heat zone or a change in taste, and causes the smoker to discard the cigarette. But, here again, there are no constants, and there is no relationship between standardized machine smoking of cigarettes and the volume of smoke which any smoker will get in smoking down to any selected butt length. About all that is known is that tobacco itself has some filter effect.

The Ogg Method does not and cannot measure these many variations in human smoking habits. It does not meas--

ure PM or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the PM or nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method.

These basic standardizations are well understood by all technologists in talking about any testing method.

Standardization Required And Embodied In The Ogg Method

Because of the minute quantities of PM present in smoke and the difficulties in impounding it on a filter pad and measuring these minute levels, the Ogg Method, or indeed any other scientific testing method, must attempt to reduce all possible variations that will substantially affect the determinations of PM and nicotine.

No standardization of technique can eliminate human error or ineptitude. No method designed can remedy the limitations in a testing method derived from the available equipment, the precision possible in its use, or its inability to secure reproducible results.

What the Ogg Method does standardize are a few of the factors—puff frequency, puff duration, and the puff volume through the filter pad—that affect the burning rate and the amount of PM and nicotine deposited.

Puff Frequency. One puff each 60 seconds, = one second is essential to the method. Two factors flow from that element of standardization. The first is that whatever smoking machine is used must precisely meet this basic time requirement. The second is a reminder that this puff frequency does not reflect widely varying smoking habits, and is an average.

Puff Duration. The puff is drawn for two seconds, again within a narrow tolerance of two-tenths of a second either way. If any results are to be accurate or remotely compara-

ble, this duration factor must be constantly watched, timed with accurate devices, and rigidly maintained by the machine.

Puff Volume. The Ogg Method standardizes this volume at 35 milliliters. Again, the permitted tolerance is = 0.5 milliliters. Obviously, puff volume is a basic controlling factor in the determination. There are various smoking machines that control puff volume, within the duration of each puff, in different ways. Once again, constant careful recalibration is essential. Once again, it must be remembered that the standardized puff volume may bear no direct relation to how any particular individual smokes, and is essentially an average.

The point to be remembered is that all of the difficulties and disclosed limitations in the Ogg Method exist even when these factors are carefully standardized. The Ogg Method of machine smoking was evolved on uniform specially prepared cigarettes. Its published description tells nothing about its use in the comparative testing of cigarettes of different brands which have varying construction, burning rate, and other variations. The Method as published discloses its variability, e.g., its limits of reproducibility, only on weight-selected cigarettes. (Compare Table 1 in the published Ogg Method.) It tells nothing about smoke volume or PM or nicotine in market-derived brands of cigarettes. For example, in smoking the same brand of conditioned cigarettes, under carefully controlled conditions with experienced technicians, the number of puffs in smoking a cigarette to a specified butt length can vary from seven to ten puffs in a single run of a machine.

How Does A Smoking Machine Collect PM And Nicotine?

For non-scientists to comprehend how a smoking machine works and the difficulties in any method employing smoking machines, there is no substitute for seeing smoking machines in operation in the hands of trained technicians. Nevertheless, the published Ogg Method indicates—and even

cursory viewing would confirm---a few of the key unavoidable operating problems. These can be easily visualized by a brief description of how the job must be done.

First, it is essential to equilibrate or condition the samples of each brand of cigarettes being tested because humidity conditions at the various pickup points vary so widely. The relative humidity encountered in New Orleans may be 90 percent, whereas in Phoenix it may be only 20 percent. In placing cigarettes on the conditioning screens, care must be exercised not to damage or fragment or spill tobacco from, the individual cigarettes.

Each filter pad is assembled in a plastic filter holder, the parts of which must be tightly screwed together, to be leak proof.

To one side there is next attached a piece of rubber membrane with a hole cut in it. This rubber membrane must be tightly locked on with a solid rubber ring.

Each assembled filter unit must then be separately tested for leaks.

Each filter assembly must next be conditioned in the correct humidity and temperature for a sufficient period.

Each unit assembly is then separately weighed and recorded to the nearest one-tenth of a milligram.

The assembled filter units are then placed in the smoking machine ports.

Some of the precise controls in placement and smoking may be indicated. The failure to exercise these will markedly affect the results.

To begin with, the smoking machine room must be precisely air conditioned for temperature and humidity control. Automatic controls for temperature and humidity must in turn be regularly verified with manual temperature and humidity checking devices.

The air flow in the machine, both at the top vents and at the smoking ports, must be checked each day with precise instruments because such air flow directly affects the burning rate of the cigarette between puffs and can materially affect the quantity of PM deposited. Absent proper venting, the machine and the room would accumulate smoke and distort the results.

Cardinally, the timing controls must be checked regularly, and on some type of machines even daily.

The entire machine assembly must be regularly checked to insure that it is leak proof throughout.

Even where the smoking machines are fully calibrated, the human factors in their operation are highly variable. When inserting the cigarette in the filter holder, the ends should not be bruised or broken. Where cigarettes are electrically ignited, the lighters should not be permitted to push the cigarettes against the filter pad. As Ogg notes, "Take care that butt end does not come in contact with [the Cambridge] filter disc."

Unless automatic cut-off devices are included in the smoking machine, the problem of watching and remembering "unders" and "overs" of butt length introduces large factors of human error. An operator has to watch, stop, and clear a number of ports within brief periods. Where automatic cut-offs are provided, carelessness in adjusting the burning threads or the springs can likewise affect the results.

For PM weighing and water and nicotine determination, other human manipulations are necessary which must be performed with both a high degree of skill and constant alert care.

The tare and second weighing of the filter unit must be performed with a chemical balance, preferably a refined, closed-chamber precision balance, within the same air-conditioned room.

In the removal of the filter pad from the smoking holder, the pad must be manually folded over with a large tweezer which is then used to rub all of the remaining PM from the holder onto the filter pad. Unless this pad folding and rubbing operation is performed carefully and completely, there may be marked variations in the latter determinations. Unless the manual wiping of the smoking holder is properly performed, as much as an entire milligram difference in the PM carried forward for the determinations can be here introduced by inexperience or ineptitude.

For water and nicotine determinations, each filter pad is next placed into a separate small flask which is then stoppered. These flasks must be carefully washed and oven dried after each use.

Thereafter each flask containing the separate filter pad must be thoroughly shaken with the precisely measured amount of solvent for up to an hour to get the water and nicotine into the solution. This must be accomplished by shaking machines or more rapidly by a spinning agitator.

Experience demonstrates that in the chromatographic determination of water variations can occur among different operators in the amount of solvent drawn and in the manner of its injection into these machines, which again requires constant calibration.

In nicotine determination, precise dilutions are necessary. In virtual mass production cigarette testing, that factor may readily become a source of human error.

The calculation of results requires the use of calculating machines and necessarily skilled operatives. Approximately two calculating machines are required in a laboratory utilizing about 40 ports.

These requirements of refined equipment and experienced personnel, and the basic limitations in the Ogg Method, underlie the necessity for the suggested period of

training for any personnel given the responsibility for operating a testing laboratory. Even Dr. Hammond found it necessary to offer that caution. (See Hammond Tr. 18-19.) They dictate further that adequate personnel must be provided.

Laboratory determinations of this nature cannot be speeded up to accommodate extraneously determined dates. At the outset, there must be at least one operator for each smoking machine, one for water determination, and two for nicotine determinations if these are to be kept in balance with the smoking machines. Additional personnel are required for calculation and recording, and for filter unit assembly and cleaning of laboratory flasks, and maintenance.

Limits Of Measurements Obtainable In Ogg Method

Even assuming adequate equipment and thoroughly experienced trained personnel, the available data makes clear the inherent limits in the Ogg Method. These can be talked about either as the limits of reproducibility of results within a single laboratory or as the variances in results found in the testing of identical cigarettes by the Ogg method among different laboratories.

These inescapable variances are in the Ogg Method itself, and have nothing to do with any variations in the population of cigarettes being tested. (That factor will be examined later.)

It can never be forgotten that the Ogg Method was evolved on a specially prepared uniform lot of cigarettes. Even so, the percentage coefficients of variance within single laboratories ranged between 1.2 percent and 5.9 percent. Between laboratories they were never lower than 9.8 percent. The mean standard deviation ranged as high as 3.19 milligrams PM for non-filter cigarettes and 2.48 milligrams PM for filtered cigarettes.

Industry testing of various brands of cigarettes, e.g., not a uniform specially prepared lot, has shown standard deviations as high as 2.8 milligrams per cigarette determined per port.

In short, even with the most accurate refined equipment and experienced personnel, the same laboratory cannot achieve reproducible results on all brands beyond these limits, and if the results of two laboratories are to be compared the spreads are greater. The significance of the variations in the method alone will be considered in discussing sample size and reporting.

Against this summary description of the machine smoking of cigarettes and what is involved in determining and reporting PM and nicotine, some additional comments may be offered on the four questions on which the Commission has invited comment.

Butt Length

Insofar as possible, the butt length to which cigarettes should be smoked in the smoking machine should be based on some rational criteria.

In any method employing machine smoking of cigarettes to determine PM and nicotine there must be standardization of puff frequency, puff duration, and buff volume. These basic factors nonetheless bear no relation to individual smoking by any human being. In that respect, as noted, these factors are when standardized initially averaged.

Because different people smoke to different butt lengths, and even the same individual will smoke to varying butt lengths depending upon the circumstances in which he is engaged, the use of an average butt length is the only rational basis to employ. To utilize predetermined average puff duration, puff volume, and puff frequency, and not to use an average butt length, creates both an illogical and unwarranted distortion in both the testing and reporting.

The recorded data makes it clear that the average butt length to which individuals smoke is somewhat in excess of 30 millimeters. No witness testified to an average of less than 30 millimeters.* Those who suggest a shorter butt length, and a different butt length for filtered cigarettes, are not unaware that doing so basically biases the comparative results under the Ogg Method largely in favor of filtered cigarettes.

It may be granted that there are presently no comprehensive studies of butt lengths, and indeed all such studies have inherent weaknesses. Butts obtained from ashtrays invariably indicate a lower average than the true length to which a cigarette is smoked because a great many smokers do not wholly extinguish cigarettes, and others exert varying degrees of pressure in attempting to extinguish them. Moreover, there is evidence that most smokers cannot smoke to less than 30 millimeters without burning their fingers. (See Hobbs Tr. 57)

If 23 millimeters were selected, 90 percent of the filter cigarettes cannot in fact be smoked to that length. Scientifically, it is not rational to adopt a standard butt length which is

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* Dr. Hammond testified that his study showed an average of "approximately 30" millimeters in the United States. (Tr. 33) Dr. Ogg testified that data available to members of the committee at the time of his study "indicated the average butt-length in this country at that time was approximately 30 millimeters," and that in a study Dr. Ogg had recently conducted "the averages came out for non-filter cigarettes was 30.2 millimeters and for filter cigarettes was 33.2." (Tr. 38-39.) Dr. Hobbs testified that a butt length of no shorter than 30 to 33 millimeters "does approximate average smoking habits." (Tr. 57.) See also the *Recommendations Submitted by Tennessee Eastman Company* stating that the results of its study "indicated that the average butt length was at least 30 mm." (p. 1) See also the various studies referred to on pages 5-6 of the *Statement to the Federal Trade Commission on Cigarette Smoking Techniques by the Celanese Corporation* all of which showed an average butt length of at least 30 millimeters.

not applicable to 90 percent of that group of cigarettes. About 99 percent of all cigarettes, both filtered and non-filtered, can be smoked to 30 millimeters.

Finally, there is no way of knowing what additional variances in the Ogg Method, which utilized a butt length of 30 millimeters, would be introduced by adopting a shorter butt length. In addition, any shorter butt length necessarily increases the difficulties for the operator in positioning the cigarettes in the smoking machine. This is a difficult and tedious task even for the most highly skilled operator having great dexterity. Moreover, the problems of terminating the machine smoking, either by observation and withdrawal, or by automatic means, make it clear that additional variances would be introduced. Reducing the butt length would require measurable increases in sample size.

Wet Or Dry Basis

Little need be added to this point. For most cigarettes, water content ranges from 6½ to 13 percent of PM collected on the Cambridge Filter. Water content among brands likewise varies even after conditioning. If the Commission is to test and record PM among brands, the failure to determine and report on a dry basis will be highly misleading.

Experience has demonstrated that test results on a dry basis contribute greater precision. As Dr. Ogg testified (Tr. 40) if the modern gas chromatographic method had been available at the time of his study, those methods would probably have been originally included to permit reporting on a dry basis.

Reporting Of Test Results

There is no challenge that results cannot be reported beyond the precision of the testing method. A spring bathroom scale, accurate only to a pound, cannot give a person's weight in ounces or fractions of an ounce.

As to particulate matter, the errors in the Ogg procedures permit accuracy only to the nearest milligram and not to any more finite values. What has already been noted with respect to the variances in the Ogg Method and the possibilities of human error in the mass testing of cigarettes makes it abundantly clear that any effort to report comparable PM results among different brands of cigarettes to less than the nearest whole milligram would be both unfounded and substantially misleading.

By the same token, the record makes clear that the failure to report results both on an average per puff and average per cigarette basis would create bias and have unwarranted adverse competitive effects.

Sampling Procedures and Number of Cigarettes To Be Smoked

There is no need for elaborate additional statistical analysis for the consideration of sample size.

To begin with it may be assumed that picking up samples of each brand at 50 market points will permit the market sample to approach a true probability sample—to which conventional statistical formulas may be applied. Such a market sample will not be a true probability sample, but for practical purposes, considering the other variances which must be dealt with, it may be considered sufficiently randomized to be utilized as though it were a true probability sample.

Next, there appears to be no disagreement that a confidence level of 95 percent will afford a reasonable criterion.

The determination of the number of cigarettes of each brand to be smoked to afford a pragmatically acceptable estimate for the entire population of a particular brand therefore turns on conventional statistical formulas that will adequately reflect the variations both in the method and in the cigarettes. The most conservative figure advanced, developed from reported industry experience, employs a standard deviation of

1.6 milligrams and yields a required sample size to be smoked of 205 cigarettes.

Statistical experts, invited carefully to study the data and make recommendations to the Commission, were in accord in advising that this suggested sample size would have to be regarded as the absolute minimum. As Dr. Herbert Arkin (an outstanding authority as indicated by his qualifications) pointed out, the variations in cigarettes within the same brand as well as the variations inherent in the Ogg Method makes it clear that the use of a standard deviation of 1.6 milligrams tends to understate the required sample size. His recommendation is that the highest reported standard deviation, rather than a value nearer the lowest, found in previous testing work, should be used, to avoid sampling and other errors. (Arkin Letter, pages 4-6.) He also notes that in most of the previous testing, cigarettes were weight selected rather than tested as they are found on the market and smoked by consumers, a factor that reduces the standard deviation, and therefore should be considered. In his judgment, therefore, a much larger sample would be appropriate, certainly at the outset and until a standard deviation for each brand has been determined.

On the basis of his conclusion that a sample size, determined by employing a standard deviation of 2.2 to 2.6 milligrams would be appropriate, a sample size of 307 to 519 cigarettes to be smoked would be required. (See Arkin Letter, pages 4-5, Appendix A.)

Mr. Hendricks, speaking for both himself and Dr. Alva L. Finkner, of the Research Triangle Institute, emphasized that in the application of conventional statistical formulas to the current problem, the fact that the percentage differences in PM and nicotine may lie within very narrow limits, to achieve the desired precision in reporting test results would call for about 350 cigarettes of each brand to be tested. This would be essential where these percentage differences be-

tween brands were 25 percent of the comparative PM values being reported. (Hendricks Statement, pages 12-14.)

Moreover, utilizing the published Reader's Digest comparative PM and nicotine values for a number of different market brands, he found that the percentage of difference was very small indeed and that if in the brands tested by the Commission comparable small percentages of differences turned up, far larger samples would be required to be tested. (Hendricks Statement, page 14.)

No valid basis was offered at the hearing for reducing the sample size to be tested below the absolute minimum level of 205 advanced by the research scientists of the five cigarette companies.

The suggestion that sample size or butt length can somehow be related to a small fraction of the population of smokers is about as valid as suggesting that average weight estimates can be developed by limiting the observations to the skinniest people in the population and drawing a small enough sample to eliminate the contributions to the average made by the heavier or even obese people.

The only remaining point of apparent confusion resides in the failure to understand that (in addition to the disclosed variations inherent in the use of the Ogg Method by thoroughly experienced tobacco technologists) there are inescapable natural variations in cigarettes. Despite recognized close quality control in their manufacture, the tobacco in cigarettes is a natural product, cigarettes are mass produced on fast machinery, and they are distributed under highly varying climatic conditions and periods of storage. In addition, the required handling in conditioning prior to testing, and in the testing procedure itself, occasions further variations. The plain fact is that in the standardized machine smoking of the same brand of cigarettes, randomly selected from a market purchase, the rate of burning causes a difference in the number of puffs ranging from seven to ten puffs per cigarette.

This in turn causes variations in the PM and nicotine deposited on the filter, and results more from the variations among cigarettes than from the limits of the method.

In short, any suggestion that every cigarette is precisely and minutely identical to every other cigarette within the same brand is fallacious. No processed natural product can be manufactured to such precise limits. Recognition of the variation in any processed agricultural product is reflected in every governmental or commercially developed grading standard.

It is perhaps unnecessary to repeat that no factual scientific data exists as to the relevance of PM or so-called "tar" or nicotine content in terms of health.

Respectfully submitted,

THE AMERICAN TOBACCO COMPANY
/S/ CYRIL F. HETSKO

BROWN & WILLIAMSON TOBACCO CORPORATION
/S/ ADDISON YEAMAN

LIGGETT & MEYERS TOBACCO COMPANY
/S/ FREDERICK P. HAAS

PHILIP MORRIS INCORPORATED
/S/ PAUL D. SMITH

R. J. REYNOLDS TOBACCO COMPANY
/S/ H. HENRY RAMM

December 20, 1966

FEDERAL REGISTER

VOLUME 32 NUMBER 147

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FEDERAL TRADE COMMISSION

CIGARETTES

Testing for Tar and Nicotine Content

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, hereby issues directions to its staff to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 33 mm.

2. Base result on a test of 100 cigarettes per brand, or type.

3. Cigarettes to be treated will be selected on a random basis, as opposed to "weight selection".

4. Determine particulate matter on a "dry" basis employment the gas chromatography method published by C.M. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 102, No. 24, page 32, dated June 17, 1965, to determine the moisture content.

5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter.

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directs that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on the open market in 50 localities throughout the United States.

Issued: July 31, 1967

By the Commission.

JOSEPH W. SHEA,
Secretary.

* * *

Federal Trade Commission

TAR, NICOTINE, AND CARBON MONOXIDE OF THE SMOKE OF 1206 VARIETIES OF DOMESTIC CIGARETTES FOR THE YEAR 1994

1997

Report of "Tar," Nicotine, and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes For the Year 1994

This report contains data on the "tar," nicotine, and carbon monoxide yields of 1206 varieties of cigarettes manufactured and sold in the United States in 1994. The Federal Trade Commission (FTC) obtained the test results from the five largest cigarette manufacturers in the United States. These companies are: Brown & Williamson Tobacco Corporation; Liggett Group, Inc.; Lorillard, Inc.; Philip Morris, Inc.; and R.J. Reynolds Tobacco Company, Inc.[1]

The Tobacco Institute Testing Laboratory (TITL), a private laboratory operated by the cigarette industry, conducted most the "tar," nicotine, and carbon monoxide tests for these varieties. The Commission collected the results of the TITL testing directly from the individual companies under compulsory process. Generic, private label, and other brands not widely available were not tested by TITL. The Commission obtained the information on these other brands directly from

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[1] The number of major domestic cigarette manufacturers went from six to five in April 1995, when the Commission approved B.A.T. Industries' acquisition of The American Tobacco Company after B.A.T., the parent company of Brown & Williamson, agreed to divest itself of certain assets it proposed to acquire from American Tobacco. In October 1996, the Commission approved B.A.T.'s application to divest six brands, a manufacturing plant, and certain related assets to Commonwealth Tobacco LLC.

the manufacturers, pursuant to compulsory process. Results of such non-TITL testing are indicated by asterisks. The methodology, processes, and procedures that the five cigarette companies and TITL employ are identical to those the Commission, in its own testing lab, had followed in the past.[2] Harold Pillsbury, the former director of the FTC laboratory and currently a contractor to the Commission had unrestricted access to the TITL laboratory to review TITL's testing methodology and protocols and to monitor the actual testing process. TITL provided the results to the respective cigarette companies, which then provided TITL's data regarding their own brands to the FTC in response to compulsory process.

The cigarettes were tested using the Cambridge Method. The FTC approved this methodology, and it has been the standard for cigarette testing since 1966. The testing was subjected to the conditions prescribed by the FTC in Federal Register, Volume 32, Number 147, Page 11,178, dated August 1, 1967. With regard to the testing of carbon monoxide yield, the conditions are specified in Federal Register, Volume 45, Number 134, Page 46,483, dated July 10, 1980. The conditions prescribed in the FTC's 1967 announcement are the following:

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[2] The Commission determined in early 1987 to close its laboratory. The Commission found that closing the laboratory was necessary for several reasons, chiefly, the cost of the laboratory was significant, and the Commission would have had to commit significant additional funds to continue the program. The Commission was also persuaded that the information could be obtained from other sources, and other means were available to verify the accuracy of industry testing results.

1. Smoke cigarettes to a 23mm. butt length, or to the length of the filter and overwrap plus 3mm. if in excess of 23mm.;
2. Base results on a test of 100 cigarettes per brand, or type;
3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection";
4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content;
5. Determine and report the "tar" yield after subtracting moisture and alkaloids (as nicotine) from particulate matter;
6. Report "tar" yield to the nearest whole milligram and nicotine yield to the nearest 1/10 milligram (32 Fed. Reg. 11,178 (1967)).

The 1980 FTC announcement contained specifications regarding a new testing methodology to determine the carbon monoxide (CO) and nicotine yield of cigarettes. These specifications are the following:

1. Determine CO concentration using a 20-port sequential smoking machine described by H.C. Pillsbury and G. Merfeld at the 32nd Tobacco Chemists Research Conference, October 1978;
2. The concentration of CO will be reported as milligrams per cigarette;
3. The present method for "tar" and nicotine determination will be modified to use the method described in an article entitled, "Gas Chromatographic Deter-

mination of Nicotine Contained on Cambridge Filter Pads," by John R. Wagner et al., as presented at the annual meeting of the Association of Official Analytical Chemists, October 1978 (45 Fed. Reg. 46,483 (1980)).

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION *393-6800 Ext. 197*

For RELEASE: A.M., Tuesday, August 1, 1967

FTC TO BEGIN CIGARETTE TESTING

The Federal Trade Commission, having been advised by the staff that the cigarette testing laboratory has satisfactorily completed its trial tests, has now issued directions to commence the first formal test, under the following conditions:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,

2. Base results on a test of 100 cigarettes per brand, or type,

3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"

4. Determine particulate matter on a "dry" basis employing the gas chromatography method published by C.H. Sloan and B.J. Sublett in Tobacco Science 9, page 70, 1965, as modified by F.J. Schultz' and A.W. Spears' report published in Tobacco Vol. 162, No. 24, page 32, dated June 17, 1966, to determine the moisture content,

5. Determine and report the "tar" content after subtracting moisture and alkaloids (as nicotine) from particulate matter,

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligrams.

The Commission directed that the test cover approximately 50 of the major brands and types (many brands are sold as regular, and king size, or filter, etc.) and all brands for which any tar or nicotine statement appears on the label or in the advertising. With respect to the latter, one purpose of the test will be to determine the accuracy of such statement. Cigarettes for testing will be purchased on the open market in 50 localities throughout the United States.

In determining the foregoing procedures, the Commission relied substantially upon a record including written presentation by interested persons and oral testimony offered at a public hearing on November 30, 1966, which was held "to assist the Commission in determining what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method . . . and the form in which test results should be expressed." At the hearing the Commission received numerous submissions reflecting a variety of modifications of the Cambridge Filter Methods that have been adopted by different groups engaged in testing cigarettes. No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either "right" or "wrong." The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method "better" than another, the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories. Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.

In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar

and nicotine, which the "average" smoker will draw from any particular cigarette.

No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation effects the tar and nicotine quantity in the smoke generated.

Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

Accordingly, the testing method should not be considered defective because it does not rely on "averages." There

are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an "average" smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly "average" smoker. It should be emphasized that the Cambridge Filter Method itself did not purport to duplicate an "average" smoker. Rather, it was an amalgam of many choices—some of them arbitrary. For example, the temperature and humidity specified in that method was not determined by reference to the "average" temperature or the "average" humidity at which people smoke cigarettes. There is no human smoker who smokes, and no cigarette that is smoked, under conditions that precisely duplicate either the Cambridge Filter Method in its original form or as modified by the Commission. Thus, to reiterate, the uniform method determined by the Commission has as its purpose measurement of the tar and nicotine generated by cigarettes when smoked according to that procedure.

There has been a wide variation among testing groups on the question of how many cigarettes of each brand to test. Recommendations were made to the Commission to test as few as 60 cigarettes per brand and as many as 200. After studying the record and its laboratory's preliminary test results, the Commission has determined that testing 100 cigarettes per brand will provide valid and reliable results. However, the Commission intends to continue evaluating its test results, and on that basis may determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary.

Chairman Dixon dissents from that part of the majority's direction on testing procedures with respect to butt length and has filed a separate statement which is attached.

Commissioner MacIntyre did not participate in the Commission's vote on this matter for the reason that he did not consider that the Commission's cigarette testing labora-

tory had satisfactorily completed its trial test so as to sufficiently and adequately advise the Commission regarding what is required in this respect.

Attached is: Separate Statement of Chairman Dixon.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JOSEPH W. SHEA
Secretary

October 25, 1967

Mr. Howard H. Bell, Director,
The Code Authority,
National Association of Broadcasters,
1771 N Street, N.W.,
Washington, D.C. 20036

Dear Mr. Bell:

This will reply to your letter of September 20, 1967, in which you inquire as to the Commission's current policy regarding (1) statements in cigarette advertising relating to health implications of tar and nicotine content of cigarettes, and (2) utilization in advertising of the official FTC tar and nicotine yield data. Your letter requests any guidance that the Commission could provide your organization in administering Radio and Television Code policies pertaining to cigarette advertising.

Any discussion of this subject at the present time must begin with the premise, which is correctly stated in your letter, that "the government would like to stress the relative advantages of low tar and nicotine yield cigarettes". In the Report to Congress on Smoking and Health, submitted on July 12, 1967, the Secretary of Health, Education, and Welfare stated that "the accumulated evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the lower the harmful effect. * * * The cigarette package label and advertising should be required to contain information on the 'tar' and nicotine levels in the smoke of the cigarette, and the identity and quantity of such other substances or agents in the smoke as may subsequently be found by the appropriate Federal agency to contribute to the health hazards of smoking."

To the same effect, the Surgeon General of the U.S. Public Health Service testified before the Senate Commerce Committee on August 25, 1967, as follows:

> "I believe that disclosure of tar and nicotine on cigarette packages and in advertisements, and the responsible promotion of those cigarettes low in tar and nicotine would be constructive and helpful steps to the extent they provide the smoker with as much information as possible on the risks of smoking and enables him to make his own decision as to the amount of dosage he will accept. Public opinion backs such action. A Public Health Service survey shows that 77 percent of people who were interviewed felt that cigarette companies should be required to list tar and nicotine content on packages; among cigarette smokers, 71 percent favored such action. As other substances are found in the cigarette smoke which contribute to the health hazard of smoking, the identity and quantity of such substances, should be included along with tar and nicotine in the package labeling and in advertising.
>
> "The question is: will tar and nicotine disclosure on cigarette packages and in advertisements encourage wider use of the brands with lower levels? I believe that a progressive reduction of tar and nicotine levels will result from such action because of public demand."

In its Report to Congress under the Federal Cigarette Labeling and Advertising Act, transmitted June 30, 1967, the Federal Trade Commission stated: "For the information of cigarette smokers, the Commission favors mandatory labeling of tar and nicotine content on cigarette packages and in cigarette advertisements and other measures that will prompt

cigarette manufacturers to develop less hazardous cigarettes. * * * It appears to the Commission, from the switch toward filter cigarettes and the popularity of low tar and nicotine cigarettes, that a substantial segment of the public is most concerned about the health hazards of cigarette smoking. Many smokers would like to give up the habit, but don't and won't. Some of these have switched to brands that they believe, often erroneously, to be less hazardous. The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test." (Pp. 8, 28.)

After review and reexamination in the light of the foregoing, the Commission's current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes may be formulated as follows: As a general rule, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission, as described in its release issued August 1, 1967. Advertisements which correctly report official FTC tar and nicotine yield data are within this category. On the other hand, statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public.

Where comparisons of tar and nicotine content with other brands of cigarettes are made, the advertising should be factual, fair, and not misleading. For example, a cigarette testing relatively high or not among the lowest in tar and nicotine yield should not be represented to be otherwise, either expressly or by innuendo. By the same token, a cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public, provided that the basis for comparison is fully and

fairly stated. It must also be borne in mind that, while presently available scientific data indicate that a substantial reduction of tar and nicotine intake may lower the harmful effects, there is no reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided. Hence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as "safe" or "safer".

The Commission recognizes that this statement of enforcement policy is necessarily cast in general terms, and that questions will inevitably arise concerning its application to particular cases. In facilitating the resolution of such problems, the Commission's advisory opinion procedure will be available to you and to members of the broadcasting and cigarette industries.

In view of the substantial public interest of the subject matter, the Commission is making public this exchange of correspondence.

By direction of the Commission.

Chairman Dixon and Commissioner MacIntyre dissented. Their separate statement is attached. Also attached is the separate statement of Commissioner Elman.

/s/ JOSEPH W. SHEA,

Joseph W. Shea
Secretary.

SEPARATE STATEMENT OF CHAIRMAN DIXON AND COMMISSIONER MacINTYRE

In response to the inquiry from the National Association Broadcasters, the Commission has set forth its current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes. In substance, the policy statement is to the effect that the Commission will not challenge representations as to tar and nicotine content of cigarettes when the representations are substantiated by tests conducted in accordance with testing methods used by the Commission. Moreover, the policy statement asserts that representations based on tests not performed in accordance with the methods set down by the Commission would tend to confuse and mislead the public. Thus, by implication, it is the stated policy of the Commission to challenge such representations.

Prior to the establishment of testing procedures by the Commission, various manufacturers had made representations as to tar and nicotine content of their individual cigarettes, based on the Cambridge Filter Method of testing, which tested cigarettes to a 30 mm. butt length. The Commission, however, in establishing its testing procedures, did not adopt the 30 mm. butt length of the Cambridge method but set 23 mm. as the standard for testing. This is the shortest butt length to which a cigarette can be tested in the Commission's testing machine. All that will be shown as the result of this standard is the maximum amount of tar and nicotine that a smoker may inhale.

Certainly, we would agree to the use of the 23 mm. butt length for testing purposes if it were established that this is the average length to which all smokers smoke their cigarettes. Unfortunately, however, this is far from being the fact. In the first place, it is physically impossible to smoke most filter brands of cigarettes to a 23 mm. butt length. As has been pointed out in a previous statement on this issue, of approximately 120 brands of cigarettes on the market, only

49 can be smoked to 23 mm. Secondly, it is agreed that because smoking habits vary greatly, smokers of nonfilter as well as filter brands smoke their cigarettes to varying butt lengths, either shorter or longer than a 23 mm. butt length.

It is generally agreed that the shorter the butt length of a cigarette, the more tar and nicotine are generated in the mainstream smoke of the cigarette. In other words, the yield of tar and nicotine is not uniform for the entire length of the cigarette. Thus, the mainstream smoke of a cigarette at, for example, a 23 mm. butt length will yield more tar and nicotine than the mainstream smoke at 30 mm. Tests performed to a 23 mm. butt length, while giving the maximum tar and nicotine content, will not be a true indication as to the tar and nicotine content of the same cigarette at 30 mm.

It is our belief that one of the purposes in establishing cigarette testing procedures was to afford smokers a meaningful way of comparing the amount of tar and nicotine yields as between brands. Under the foregoing circumstances, we do not see how the Commission's standards will accomplish this purpose. In our view, it is misleading to require that tests be performed to a butt length which gives a maximum yield of tar and nicotine in nonfilter cigarettes when, in fact, it has not been established that this is an average butt length for smokers, and it is not possible to smoke certain filter brands to that butt length.

We would not challenge representations based on tests performed to a 30 mm. butt length. Since most brands of cigarettes can be tested to that length, the smoker would have a meaningful way of comparing tar and nicotine content regardless of the overall length of the cigarettes. We realize, of course, that there are possibly five brands of cigarettes which cannot be smoked even to 30 mm However, the 30 mm. standard would serve to minimize the disadvantages inherent in the 23 mm. standard which, in effect, precludes a meaningful comparison between a majority of the brands now on the market.

SEPARATE STATEMENT OF COMMISSIONER ELMAN

It is true, as Chairman Dixon points out, that the Commission's tests will show the maximum amount of tar and nicotine that a smoker of a particular brand will inhale. It is also true, as he notes, that brands of cigarettes on the market vary in length. Thus, if Brand A is 100 mm. long and Brand B, made of the same tobacco, is 85 mm. long, the tests will show Brand A as containing more tar and nicotine than Brand B. According to Chairman Dixon, this is "misleading". I do not agree.

Suppose, for example, that one were to test the caloric content of chocolate bars. Brand A is sold in a 4 oz. size, and Brand B, made of the same ingredients, is sold in a 3 oz. size. One who eats a Brand A bar will consume substantially more calories than Brand B. Is it "misleading" to report that Brand A contains more calories than Brand B? Chairman Dixon would answer "yes", because it is "not established" that the "average person" will eat the whole bar. Conceivably, he might eat only half of a Brand A bar—in which case he would be consuming fewer calories than if he ate all of Brand B. The Chairman applies the same reasoning to the testing of cigarette brands for tar and nicotine content.

Moreover, even he does not propose that the testing procedure should be to smoke a uniform length (say, 50 mm.) of every cigarette regardless of its actual size. His proposal was, and is, that all cigarettes, regardless of size, be smoked down to a butt length of 30 mm. Thus, if the Chairman's testing procedure were to be used, the machine would smoke 70 mm. of Brand A, 100 mm. long, and 55 mm. of Brand B, made with the same tobacco but 85 mm. long. The Chairman's test results would be just as "misleading" in showing Brand A as containing more tar and nicotine than Brand B.

The Chairman also points out that many filter brands cannot be smoked down to a butt length of 23 mm. Taking

that fact into account, the Commission's testing procedure provides that all such cigarettes shall be tested to a butt length of "the filter and overwrap plus 3 mm." In this respect the Commission adopted the proposal made not only by the health and medical organizations but also by industry representatives. This testing procedure clearly affords a sensible and meaningful basis for comparing the maximum tar and nicotine yields as between brands of cigarettes; and it is neither accurate nor fair to suggest otherwise.

The fact of the matter is that there is nothing "misleading" in the testing procedure adopted by the Commission. The difference between the Chairman and the majority of the Commission is quite simple. He would test a cigarette for only part of its tar and nicotine content. We would test for all of it. By analogy, the Chairman would determine the alcohol content of a martini by testing the vermouth but not the gin. Query: who is "misleading" whom?*/

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*/ Since the Chairman has seen fit to rehash the arguments considered and rejected by the Commission before adopting its testing procedure, it is appropriate to repeat the following excerpts from the Commission's release of August 1, 1967:

> "No test can precisely duplicate conditions of actual human smoking and, within fairly wide limits, no one method can be said to be either 'right' or 'wrong.' The Commission considers it most important that the test results be based on a reasonable standardized method and that they be capable of being presented to the public in a manner that is readily understandable. Although minor variations may not make one testing method 'better' than another, the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories. Use of more than one testing method would produce different results which would only serve to confuse or mislead the public.
>
> "In determining the testing method, the Commission has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette.

[Footnote continued on next page]

[Footnote continued from previous page]

"No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated.

"Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarettes down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers.

"The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.

"Accordingly, the testing method should not be considered defective because it does not rely on 'averages.' There are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an 'average' smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly 'average' smoker."

Smoking and Tobacco Control

Monograph 7

The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes

Report of the NCI Expert Committee

NATIONAL INSTITUTES OF HEALTH
National Cancer Institute

Foreword

In response to the emerging scientific evidence that cigarette smoking posed a significant health risk to the user, in the early 1950's the major cigarette manufacturers began widespread promotion of filtered cigarettes to reassure smokers that, regardless of whatever unhealthy constituents were in cigarette smoke, filters were a "scientific" breakthrough.

Advertisements for Viceroy's "health guard filter" stated, "DENTISTS ADVISE—Smoke VICEROYS—The Nicotine and Tars Trapped by The Viceroy Filter CAN NEVER STAIN YOUR TEETH!" and "Leading N.Y. Doctor Tells His Patients What to Smoke—Filtered Cigarette Smoke Is Better For Health. The Nicotine and Tars Trapped . . . Cannot Reach Mouth, Throat Or Lungs." Chesterfield was "Best for you—*low* in nicotine, highest in quality," while L&M's were "Just What the Doctor Ordered." Lorillard Tobacco Company stressed its science-based Kent micronite filter (the original micronite filter was made of asbestos) and claimed it removed seven times more tar and nicotine than any other cigarette, which "put Kent in a class all by itself where health protection is concerned." Of course, we know today that not only were these claims patently false, but the cigarette companies knew it.

In the early 1950's the Federal Trade Commission (FTC) challenged a variety of health claims made for cigarettes in their advertising, including claims about tar and nicotine. In

1955 FTC published advertising guidelines that, among other things, prohibited claims by cigarette manufacturers that a particular brand of cigarettes was low in tar and nicotine or lower than other brands, when it had not been established by competent scientific proof that the claim was true and the difference was significant. Cigarette manufactures, however, continued to advertise tar numbers. In the absence of a standardized test methodology, this resulted in what is referred to as a "tar derby"—a multitude of inconsistent, noncomparable claims that did not give consumers a meaningful opportunity to assess the relative tar delivery of competing brands. The tar derby ended in 1960 when discussions with FTC culminated in an industry agreement to refrain from tar and nicotine advertising.

In 1966, however, the U.S. Public Health Service (PHS) prepared a technical report on "tar" and nicotine that concluded, "The preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." In reaching this conclusion, the report noted the clear relationship between dose of cigarette smoke received by the smoker and disease risk. Regardless of how dose was calculated—by number of cigarettes smoked per day, age of initiation, total number of years one smoked, or depth of inhalation, mortality rates among smokers increased. When smokers quit smoking, their risk was reduced in proportion to the length of time off cigarettes.

Subsequent to the PHS statement, FTC reversed its decision banning tar and nicotine claims in advertising and established a standardized testing protocol for assessing tar and nicotine yields. Today that protocol is widely known as the FTC test method. In 1980 the protocol was broadened to include measurement of the carbon monoxide yields of cigarettes as well.

The initial protocol adopted by FTC was largely based on the work of U.S. Department of Agriculture chemist C.L.

Ogg, as published in the *Journal of the Association of Official Agricultural Chemists* in 1964. It appears, however, that this protocol was based on one person's observations about how people smoked.

Much the same protocol had been proposed by American Tobacco Company researchers in 1936. Writing in the July Issue of *Industrial and Engineering Chemistry*, J.A. Bradford and colleagues noted, "The present writer's arbitrarily selected rate is a 35-cc puff of 2-second duration taken once a minute."

However, cigarettes consumed at that time were vastly different from those manufactured and marketed later. In fact, tar and nicotine levels began to decline during the 1950's, concurrent with the mass marketing of filter cigarettes. Market share of filter cigarettes increased from almost zero in 1950 (0.6 percent of the market) to 50 percent by decade's end. Total cigarette sales, which had begun to decline after the first public statements about the hazards of smoking in the early 1950's, rebounded to new highs.

Although filter efficiency may have contributed to some of the reduction in tar/nicotine yields in the 1950's, the decline resulted mostly from less tobacco being used to make filtered as opposed to unfiltered cigarettes. However, during the 1960's and 1970's major cigarette design changes resulted in significantly lower machine-measured cigarette yields. The changes included increased use of ventilated tobacco rods and filters, use of more porous cigarette papers, and increased use of expanded and reconstituted tobacco. Concurrent with these modifications in cigarette design, cigarette manufacturers increasingly made use of additives in manufacturing. Today about 600 different compounds are routinely added to domestic cigarette brands, yet no routine testing is performed to determine whether these compounds pose any additional health risk to the smoker when they are burned in a cigarette.

U.S. market share of cigarettes yielding 15 mg tar or less went from 3.6 percent in 1970 to 44.8 percent by 1980. The sales-weighted average tar and nicotine yields of all U.S. cigarettes are now approximately 12 mg tar and 0.9 mg nicotine. By comparison, sales-weighted yields in the early 1950's were 35 mg tar and 2.5 mg nicotine.

As consumption of low-yield cigarettes began to proliferate, the public health community became concerned that these products were not what they seemed. Increasingly, scientific studies documented that smokers who switched to these low-yield products smoked them differently, thus negating the reason many of them changed in the first place—to lower their health risk.

The U.S. Congress also voiced its concern in 1978 when it enacted the Health Services and Centers Act. Section 403 of that legislation directed the U.S. Department of Health and Human Services (DHHS) to conduct a "study or studies of (1) the relative health risks associated with smoking cigarettes of varying levels of tar, nicotine, and carbon monoxide; and (2) the health risks associated with smoking cigarettes containing any substances commonly added to commercially manufactured cigarettes." The Secretary of the Department of Health and Human Services addressed this issue as part of the 1981 Surgeon General's report, *The Health Consequences of Smoking: The Changing Cigarette*. The overall conclusion of that report was clear: There is no safe cigarette and no safe level of consumption." Although the report did note that smoking cigarettes with lower yields of tar and nicotine reduces the risk of lung cancer to some extent, the benefits are minimal in comparison with giving up cigarettes entirely. Evidence relating to heart disease, other cancers, or chronic obstructive lung disease was not sufficient to permit conclusions to be drawn. As to the accuracy of the FTC test method, the report stated: "The 'tar' and nicotine yields obtained by present testing methods do not correspond to the

dosages that the individual smokers receive: In some cases they may seriously underestimate these dosages."

Growing numbers of questions were raised about the accuracy of the FTC test protocol to measure tar, nicotine, and carbon monoxide levels from low-yield cigarettes—questions raised not just by the public health community but also within the tobacco industry. Competitors complained to FTC that Brown and Williamson's (B&W) Barclay brand cigarette did not test accurately with the FTC test method. They argued that the brand was designed with unique air ventilation channels that caused it to test low on the FTC method. The ventilation channels, which remained open when Barclays were smoked on the FTC machine, were rendered inoperable when a human being smoked the cigarettes. In April 1983 FTC announced that its testing method understated values for constituents in Barclay cigarettes, and as a result, until new testing methods were developed, FTC would no longer report an official rating for Barclay cigarettes. Later, FTC took similar steps with respect to other B&W cigarette varieties that used a filter design similar to Barclay's.

Eventually FTC closed its cigarette testing laboratory, in part because of insufficient expertise within the agency to carry out an increasingly complex and costly testing program. Since 1987, constituent levels for domestic cigarette brands have been determined for the manufacturers by the Tobacco Institute Testing Laboratory with oversight by FTC. The Tobacco Institute serves as a trade organization as well as the information and lobbying arm of the tobacco industry.

In June 1994 the Chairman of the House Subcommittee on Health and the Environment wrote the Director of the National Cancer Institute (NCI), asking him to convene a meeting of experts to ". . . review and make recommendations on the accuracy and appropriateness of the Federal Trade Commission's method for determining the relative 'tar' and nicotine content of cigarettes." A similar request was received from the FTC Chairman asking that NCI convene a consen-

sus conference on the topic and outlining several areas it wished to be considered.

On December 5 and 6, 1994, a meeting of the NCI ad hoc expert committee was convened under the aegis of the President's Cancer Panel to examine this issue. The committee consisted of 11 individuals from diverse scientific backgrounds and experience. The committee had the benefit of excellent presentations from 14 experts whose professional careers were not only involved in research on smoking, but who have been active contributors to this field of scientific inquiry. Two of the individual participants were cigarette industry scientists, who participated in all discussions.

From the outset of the committee's deliberations, it was clear that the intent of the meeting was not to redesign the FTC testing protocol but, rather, to examine the protocol and make suggestions for improvement, if warranted. To provide a framework for discussion, the committee was asked to consider three basic questions:

1. **Does the evidence presented clearly demonstrate that changes are needed in the current FTC protocol for measuring tar, nicotine, and carbon monoxide? If yes, what changes are required?**
2. **Should constituents other than tar, nicotine, and carbon monoxide be added to the protocol?**
3. **Does the FTC protocol provide information useful to smokers in making decisions about their health?**

I. The committee reached the following conclusions with respect to the first question.

A. The smoking of cigarettes with lower *machine-measured* yields has a small effect in reducing the risk of cancer caused by smoking, no effect on the risk of cardiovascular diseases, and an uncertain effect on the risk of pulmonary disease. A reduction

in *machine-measured* tar yield from 15 mg tar to 1 mg tar does not reduce relative risk from 15 to 1.

B. The FTC test protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns, which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior, which may negate potential health benefits.

C. Accordingly, the committee recommends the following changes to the FTC protocol:

1. This system should also measure and publish information on the range of tar, nicotine, and carbon monoxide yields that most smokers should expect from each cigarette sold in the United States.

2. This information should be clearly communicated to smokers.

3. A simple graphic representation should be provided with each pack of cigarettes sold in the United States and in all advertisements. The representation should not imply a one-to-one relationship between measurements and disease risk.

4. The system must be accompanied by public education to make smokers aware that individual exposure depends on how the cigarette is smoked and that the benefits of switching to lower yield cigarettes are small compared with quitting.

D. There should be Federal oversight of cigarette testing, but such testing should continue to be per-

formed by the tobacco industry and at industry expense.

E. The questions involved in the purpose, methodology, and utility of the FTC protocol are complex medical and scientific issues that require ongoing involvement of Federal health agencies; including the National Institutes of Health, the Food and Drug Administration, and the Centers for Disease Control and Prevention.

F. The system should be reexamined at least every 5 years to evaluate whether the protocol is maintaining its utility to the smoker.

G. When a cigarette manufacturer makes significant changes in cigarette design that affect yields, it should notify the appropriate Federal agency.

II. With regard to the second question, the committee recommends that to avoid confusing smokers, no smoke constituents other than tar, nicotine, and carbon monoxide be measured and published at the present time. Smokers should be informed of the presence of other hazardous smoke constituents with each package and with all advertisements. These constituents should be classified by toxic effects.

III. In considering the third question, the committee reached the following conclusions:

A. Information from the testing system is useless to smokers unless they have ready access to it. The information from the testing system should be made available to all smokers, including those who smoke generic brands and other brands not widely advertised.

B. Brand names and brand classifications such as "light" and "ultralight" represent health claims and

should be regulated and accompanied, in fair balance, with an appropriate disclaimer.

C. The available data suggest that smokers misunderstand the FTC test data. This underscores the need for an extensive public education effort.

As Chairman of the President's Cancer Panel under whose aegis this meeting was convened, I would like to express here my admiration and deep appreciation to the members of the NCI ad hoc committee and its expert consultants for a job well done. In transmitting this report to both the U.S. Congress and the Federal Trade Commission, it is my sincere hope that the recommendations contained herein will receive the serious and thoughtful consideration they deserve.

Harold P. Freeman, M.D.
Chairman, President's Cancer Panel

Chapter 1

Cigarette Testing and the Federal Trade Commission: A Historical Overview[1]

C. Lee Peeler

Cigarette manufacturers began advertising their products' tar and nicotine content before there was a standardized procedure for testing cigarette output. In 1955, after a series of cases challenging a variety of claims made for cigarettes (including tar and nicotine claims),[2] the Federal Trade Commission (Commission or FTC) published cigarette advertising guides. Among other things, the guides prohibited claims that a particular brand of cigarettes was low in tar and nicotine or lower than other brands "when it has not been established by competent scientific proof . . . that the claim is true, and if true, that such difference or differences are significant" (Federal Trade Commission, 1988a).

However, cigarette manufacturers continued to advertise tar numbers. In the absence of a standardized testing methodology, their claims resulted in what is often referred to as the "tar derby"—a multitude of inconsistent, noncomparable

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1 These remarks are the views of the staff of the Bureau of Consumer Protection. They do not necessarily represent the view of the Commission or any individual commissioner.

2 *See, e.g., Reynolds Tobacco Co. v. FTC*, 192 F.2d 535 7th Cir. (1951) (claims that Camel does not impair the physical condition of athletes and aids digestion); *American Tobacco Co.*, 47 F.T.C. 1393 (1951) (Lucky Strike cigarettes advertised as less irritating to the throat than competing brands and containing less tar than four other leading brands); *P. Lorillard Co.*, 46 F.T.C. 735 (1950) (Old Gold cigarettes advertised as lowest of seven leading brands in nicotine and throat irritating tars, and Beech-Nut cigarettes as providing "definite defense against throat irritation"). *See also, e.g., Leighton Tobacco Co.* 46 F.T.C. 1230 (1950) (Phantom cigarettes represented as causing no irritation of any kind).

claims that did not give consumers a meaningful opportunity to assess the relative tar delivery of competing brands. The tar derby ended in 1960, when discussions with the Commission culminated in an agreement by the industry to refrain from tar and nicotine advertising (Federal Trade Commission, 1988b).

In 1964 the first Surgeon General's report on the health risks of smoking concluded that cigarette smoking was a cause of lung cancer in men (U.S. Department of Health and Human Services, 1964). In 1966 the Public Health Service stated that "The preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke, the less harmful would be the effect" (U.S. Department of Health and Human Services, 1981, p. v).

It was in this environment that the Commission initiated two major steps in 1966 to encourage cigarette manufacturers to provide consumers with comparative information about their products' tar and nicotine yields. First, it ended the ban on tar and nicotine advertising by announcing that factual statements of the tar and nicotine content of mainstream cigarette smoke could be made if they were supported by tests conducted in accordance with the so-called "Cambridge Filter method" and if they were not accompanied by claims about reduced health hazards (Federal Trade Commission, 1988a). Second, it authorized establishment of a laboratory to analyze cigarette smoke and invited public comment on what modifications, if any, should be made to the Cambridge Filter method for purposes of the laboratory's procedures and how the test results should be expressed (*Federal Register*, 1966). The modified Cambridge Filter method ultimately adopted by the Commission is often referred to as the "FTC method."

By mid-1967 the laboratory was ready to begin testing cigarettes (*Federal Register*, 1967).[3] The Commission agreed, pursuant to Senator Warren Magnuson's request,[4] to report the test results to Congress periodically, a process that continues today.

From the outset, the testing was intended to obtain uniform, standardized data about the tar and nicotine yield of mainstream cigarette smoke, *not* to replicate actual human smoking. The Commission recognized that individual smoking behavior was just that—too individual to gauge what a hypothetical "average" smoker would get from any particular cigarette: "No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion" (Federal Trade Commission, 1967). The purpose of the testing was "not to determine the amount of 'tar' and nicotine inhaled by any human smoker. but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" (Federal Trade Commission, 1967). Indeed, the Cambridge Filter method did not attempt to duplicate an "av-

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[3] For the first dozen years of its existence, the laboratory tested only for tar and nicotine. In 1980 the protocol was modified to add testing for carbon monoxide.

[4] Expressing the opinion held at that time by many people in the Federal Government, Senator Magnuson stated that "By encouraging smokers to switch to low tar/nicotine cigarettes, we can contribute meaningfully to the physical health of our nation. Publication of the Commission's testing results is one important facet.

The Commission expressed its views concerning dissemination of tar and nicotine figures in an October 1967 letter to the National Association of Broadcasters: "The Commission favors giving smokers as much information about the risks involved in smoking as is possible and to that end favors mandatory disclosure of tar and nicotine content, as measured by a standard test."

erage" smoker but was "an amalgam of many choices" (Federal Trade Commission, 1967). Because no test could accurately duplicate human smoking, the Commission believed that the most important thing was to make certain the results presented to the public were based on a reasonable, standardized method and could be presented to consumers in an understandable manner.

The Commission next attempted to increase consumer awareness of the ratings produced by its laboratory. In 1970 it proposed a trade regulation rule that would have required disclosure of tar and nicotine ratings in all cigarette advertising (*Federal Register*, 1970). The rulemaking was suspended indefinitely a short time later, when five of the major cigarette manufacturers and three small companies agreed voluntarily among themselves to include the ratings produced by the Commission's protocol in their advertisements. That agreement, modified to reflect the discontinuance of the Commission's laboratory, remains in effect today.[5]

There are a number of ways to lower a cigarette's tar and nicotine rating, including adding filters that literally trap some of the constituents of the tobacco smoke before they reach the machine, wrapping the tobacco plug in paper that burns relatively quickly, and placing ventilation holes around the circumference of the filter so that when a smoker or smoking machine puffs on the cigarette, air is drawn into the filter and the resulting diluted mixture of air and smoke yields lower tar and nicotine ratings than the undiluted puff of smoke would yield. The last technique is often referred to as "aeration."

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[5] The American Tobacco Company did sign the voluntary agreement, but similar disclosures have been contained in its advertisements, pursuant to a 1971 consent agreement with the Commission. [*In re American Brands, Inc.*, 79 F.T.C. 255 (1971).]

These types of changes in cigarette technology have focused the Commission's attention on its protocol on two separate occasions since 1970. In both cases, the Commission has solicited public comments on certain aspects of the FTC method. However, in neither instance did the information received by the Commission form a sufficient basis for changing the protocol, even though the limitations on the predictiveness of the FTC method caused by compensatory smoking were clearly recognized by the mid-1980's. ("Compensatory behavior" is the tendency of consumers to offset the benefits of a positive change in their behavior by making a second, negative change. For example, a smoker who switches to a brand with lower tar and nicotine ratings might smoke more cigarettes each day or smoke each one more intensively, that is, inhale more deeply and/or take more puffs per cigarette.) Following is a review of the two events referred to above.

Aeration first became an issue for the Commission in 1977, when Lorillard, Inc., suggested that the depth to which cigarettes were inserted in the Commission's smoking machine be decreased when the standard dept would block some of a cigarette's ventilation holes, thereby impairing its filtration system and resulting in higher ratings than if the holes were open. The Commission solicited public comments on this question and also on whether the insertion depth should be decreased beyond the point where consumers cover the cigarette with their fingers or lips (*Federal Register*, 1977).

Of the seven cigarette companies that commented, only Lorillard supported varying the standard insertion depth. However, none of the responders addressed the question of whether the new insertion depth would be more consistent with actual smoking practices. After reviewing the comments, the Commission noted that the development of ciga-

rettes with ventilation holes near the tip had complicated the comparability of its tar and nicotine ratings,[6] but "that a change in the insertion depth would cause a lack of continuity with previous test results" (*Federal Register*, 1978, pp. 11856, 11857). The Commission decided not to modify the protocol "in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use" (*Federal Register*, 1978, p. 11857).

Another controversy concerning the test method arose in the early 1980's and involved the Brown & Williamson Tobacco Corporation's (B&W) Barclay cigarette, which was designed with a channel ventilation system rather than air holes.[7] Competitors claimed that Barclay, which had re-

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[6] Quoting its 1967 statement that the purpose of testing was not to determine the amount of constituents inhaled by a human smoker but to determine the amount generated when a cigarette was smoked by a machine in accordance with a prescribed protocol (see above), the Commission noted that:

> The point of this statement was that the FTC's "tar" and nicotine values represented valid standards for making comparisons among different cigarettes. Thus, if the consumer smoked each different cigarette the same way, he would inhale "tar" and nicotine in amounts proportional to the relative values of the FTC figures. A person who smoked a 10 mg "tar" cigarette would ingest half the "tar" he would by smoking a 20 mg "tar" cigarette providing he smoked the same way. The development of cigarettes with ventilation areas within 11 mm of the tip has complicated this simple relationship. (*Federal Register*, 1978, p. 11856)

[7] In conventional aerated cigarettes, air and smoke mixed together as they passed through the filter. Outside air drawn into Barclay's channels, however, went directly into the smoker's mouth before first mixing with any smoke; dilution was supposed to occur in the mouth, not in the filter. Competitors alleged that because the exit holes for the channels were close to the smoker's lips, they were crushed or covered by lips, thus reducing dilution.

ceived an official FTC rating of 1 mg tar in 1981, did not test accurately on the FTC smoking machine because the channels remained open during testing but were rendered inoperable in practice. After careful consideration, the Commission determined that its present test method did not accurately measure Barclay's tar, nicotine, and carbon monoxide. It revoked the 1-mg rating, estimating that Barclay should be rated between 3 and 7 mg of tar (based on testing by independent consultants) and invited comments on a number of issues relating to possible modification of its testing method, including using new cigarette holders on the smoking machine that would simulate the reduction in ventilation that occurred when people smoked Barclay (*Federal Register*, 1983). The Commission asked which modifications would yield the most appropriate results for all cigarettes and whether modification of the cigarette testing method would result in unintended consequences and affect possible innovation in cigarettes design (*Federal Register*, 1983).

The Commission also took this opportunity to reiterate that its ratings were relative; that the amount of tar, nicotine, and carbon monoxide any particular cigarette delivered depended on how it was smoked; and that in the case of ventilated filter cigarettes, delivery would be increased if ventilation holes were blocked (*Federal Register*, 1983). It then invited comments on a wide range of issues concerning compensatory smoking behavior.

> Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hole blocking by smokers of different ventilated filter cigarettes? Are there problems regarding

> compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked? (*Federal Register*, 1983)

Shortly after the initial comment period closed,[8] a Federal district court issued an opinion in the Commission's action against B&W over advertisements that continued to describe Barclay as a 1-mg tar cigarette, despite the Commission's revocation of Barclay's 1-mg rating [*FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part, remanded in part*, 778 F.2d 35 (D.C. Cir. 1985)]. During that litigation, B&W contended that "recent scientific evidence demonstrates that the FTC system is so flawed that it is itself deceptive" [580 F. Supp. at 984].[9] The

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[8] Comments responsive to the April 13, 1983, *Federal Register* notice were originally due by June 30, 1983. On June 4, 1984, however, the Commission reopened the comment period because certain information that was relevant to the questions addressed in that notice, but had been previously under a court-ordered seal, was now publicly available (*Federal Register*, 1984).

[9] B&W argued that all cigarettes were subject to compensatory smoking behavior and thus all tar numbers were "soft." The Commission acknowledged that low-yield cigarettes were subject to substantial variations in actual smoker intake but contended that Barclay tested differently on the machine from other cigarettes. The Commission's position was that the tar ratings provided a rough comparative scale; that is, a 1-mg

[Footnote continued on next page]

court recognized that compensatory smoking behavior complicated the ratings question but rejected B&W's contention that the system provided no benefit to consumers:

> The FTC system attempts only to determine how much relative tar and nicotine a smoker would get in his mouth were he to smoke two cigarettes in the same manner. B&W has utterly failed to show that the system does not do this. Nor has it shown that a better method for determining the relative health hazards of the many different varieties of cigarettes on the market is currently feasible [580 F. Supp. at 985].

The comments ultimately submitted in response to the Commission's questions about compensatory smoking reflected sharply disparate views. On the one hand, the American Heart Association (AHA), American Lung Association (ALA), and American Cancer Society (ACS) identified problems with the existing methodology, expressed concern over the impact of compensatory smoking behavior, and suggested extensive research to improve the current testing and reporting procedures.[10]

[Footnote continued from previous page]

cigarette should be comparable to all other 1-mg cigarettes, if all are smoked in an identical manner.

[10] The ALA stated that given the reality of compensatory smoking, low-tar cigarettes might not be as safe as some consumers were being led to believe and that the Commission's testing and reporting procedures were contributing to questionable advertisements for "safe" cigarettes. The ACS stated that the Commission's test method should be modified to reflect current understanding of compensatory smoking behavior. The AHA expressed its view that the Commission's testing and reporting procedures fostered the belief among consumers that low-tar cigarettes were safer than high-tar brands. However, epidemiological evidence showing a

[Footnote continued on next page]

On the other hand, Philip Morris, R.J. Reynolds Tobacco Company, and American Brands asserted that compensatory smoking behavior was not relevant to the testing methodology and that devising a protocol that accounted for compensatory smoking would require establishing a profile of the average smoker, something the Commission had previously declined to do because of the impossibility of accounting for all the relevant variables. Lorillard stated that data on compensatory smoking were very limited and therefore recommended that the existing system be kept intact. Liggett & Myers suggested that perhaps all cigarette testing should be abolished because smoking behavior could seriously affect tar and nicotine yields and smokers could not be taught to change their behavior.

In response to the Commission's question about possible implementation of a "banding" system for its tar and nicotine ratings, B&W (which had just had Barclay's rating revoked) argued that the current system caused manufacturers to emphasize small differences that might not exist, given the realities of compensatory smoking, and that it should be replaced with a system that would group products into high-tar, medium-tar, low-tar, and ultra low-tar "bands." Philip Morris and American Brands argued that banding would lead to a

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correlation between the risk of coronary heart disease and the number of cigarettes smoked per day, but not a reduced rate of such disease among low-tar smokers, suggested that smokers of those cigarettes might be engaging in compensatory smoking.

The ALA and ACS recommended that research be conducted to determine how actual intake of tar and other smoke constituents by smokers related to the FTC's ratings; following completion of this research, the Commission should test each cigarette under a range of conditions replicating actual smoking behavior and report those results with a warning that individual yield depends on individual smoking patterns.

concentration of brands at the upper limit of each category (in contrast to the existing system, which encouraged reductions across the board). American Brands also contended that banding would confuse consumers, whereas Philip Morris noted that it would substitute the Government's judgment about the significance of differences in tar ratings for that of the individual consumer:

In short, there was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, abandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's (U.S. Department of Health and Human Services, 1981).[11] Accordingly, at that time the Commission made no changes to its cigarette test method to address compensatory smoking.

In early 1987 the Commission decided to close its cigarette testing laboratory. The Commission found that closing the laboratory was necessary for several reasons, chiefly because the cost of the laboratory was significant and the Commission would have had to commit significant additional funds to continue its operation. The Commission also was persuaded that the same information could be obtained from other sources and that other means were available to verify the accuracy of industry testing results. In fact, the Commission's operation of a testing system for the industry at taxpayer expense was highly unusual. The common scenario is

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11 In 1954 the tar yield of the sales-weighted average cigarette was 37 mg (U.S. Department of Health and Human Services, 1981). By 1981 cigarettes yielding 15 mg of tar or less had 56 percent of the domestic market (Federal Trade Commission, 1984).

for the industry to conduct its own testing under Government-specified testing protocols.

Since 1987 the Tobacco Institute Testing Laboratory (TITL) has continued to test most cigarettes, using the Commission's approved methodology; the companies report the results to the Commission pursuant to a compulsory request, and the Commission publishes the results. TITL keeps the Commission informed of proposed changes in the testing procedure and solicits Commission approval for all significant changes. TITL's work is regularly monitored by the Commission's contractor, Harold Pillsbury, Jr. (this volume), who has virtually unrestricted access to the laboratory and makes unannounced visits to inspect it and check the testing process. Mr. Pillsbury also checks the data for consistency from run to run and from year to year. Most industry members also have testing facilities; however, the numbers published by the Commission are primarily TITL numbers. (Generic and private label brands, as well as new cigarettes and cigarettes that are not widely available, are not tested by TITL.)

Since the closing of its laboratory, the Commission has continued to review advertising for today's low- and ultralow-yield cigarettes for deceptive claims. In January 1995 the Commission approved a consent agreement with the American Tobacco Company, settling charges over advertisements that allegedly misused the Commission's tar and nicotine ratings by stating that consumers would get less tar by smoking 10 packs of Carlton brand cigarettes (which are rated as having 1 mg of tar per cigarette) than by smoking a single pack of certain other brands of cigarettes (rated as having more than 10 mg of tar per cigarette).

The Commission's desire to ensure that smokers have accurate and useful information about their cigarettes led to its request for the conference, whose reports are contained in this monograph.

FTC NICOTINE PROGRAM

HEARING
Before The
SUBCOMMITTEE ON
TRANSPORTATION, TOURISM, AND HAZARDOUS MATERIALS
Of The
COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

May 7, 1987

Serial No. 100-42

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* * *

Mr. LUKEN. The gentleman from Kansas.

Mr. WHITTAKER. Thank you, Mr. Chairman.

The testimony that we receive today will help us review the FTC decision to close its cigarette testing laboratory. I regret, however, that the final decision to focus this hearing on this issue was only made recently, resulting in somewhat rushed preparations by both the witnesses and the members of this subcommittee. Perhaps we can work together to avoid this type of situation in the future.

Last month, the FTC pulled the plugs on their smoking machines used to test tar and nicotine levels in cigarettes. This hearing will enable us to determine whether the taxpayers should continue to pay for these smoking iron lungs.

The purpose of the FTC laboratories was to ensure the manufacturers truthfully advertised the levels of tar and nico-

tine in their cigarettes. Cigarette manufacturers also test their own as well as their competitor's products and we are told they uniformly use the FTC testing procedure. Therefore, the manufacturers' results have consistently been the same as the FTC's. The FTC believes it can depend upon the industry test results in conjunction with the competitive spirit between the individual manufacturers to ensure truth in advertising.

Some health organizations, however, question whether the tobacco industry can be trusted to issue correct measurements on its own products. They assert that there will be an inherent conflict of interest. Today's hearing will enable us to test the FTC's faith in the industry's tests and its enforcement of truthful advertising.

Mr. Chairman, I for one believe that too many people endanger their health by smoking. It is important that the public be fully informed about the content of tar and nicotine in cigarettes which cause serious health consequences.

I commend you very strongly for calling this hearing and I look forward to the witnesses' testimony which will help us determine if the FTC's laboratory is necessary to fully inform the public.

Thank you.

Mr. LUKEN. The gentleman from NJ, Mr. Florio.

Mr. FLORIO. Thank you very much, Mr. Chairman. I, too, am pleased to be here and commend you for calling these hearings.

This, I think, is the first hearing that we have had with regard to the FTC. I assume at some point before too long we will be going into reauthorization hearings for this Agency that some of us regard as a less than aggressive Agency over the last number of years, that has had its troubles. The jurisdiction of the Agency, of course, falls into two areas, the anti-trust area and the consumer protection area, which in a sense we are dealing with today. I can't but notice

in today's New York Times on the anti-trust side, on the business first page, the suggestion that the General Motors/Toyota agreement, which some of us were not enthusiastic about the FTC approving in a very cursory way years ago, that in a sense didn't pay a lot of attention to the traditional anti-trust standards and justified the merger going forward or the joint venture going forward on the basis of efficiencies, and apparently the reports today indicate General Motors has not been the big beneficiary of the efficiencies that some suggested were going to result from this somewhat strange joint venture being allowed between the number one and number three car manufacturers in the world.

Today's hearing, of course, goes to the second part of the jurisdiction, consumer protection. I think we are talking about the specific problem today but it is also an aspect of the ad substantiation responsibilities of the FTC, going into the responsibilities of the FTC in ensuring that we have nondeceptive and fair advertising.

I hope that through the course of the morning we will talk a little bit about the general approach that the commission is taking towards that area of its jurisdiction, this piece of it being of course the ability of the commission to determine whether advertising is deceptive, whether it is fair and whether it is substantiated by the facts, when claims are made.

Mr. Chairman, I commend you for these hearings and look forward to taking part in them today.

Mr. LUKEN. The gentleman from Tennessee.

Mr. COOPER. I have no opening statement, Mr. Chairman.

Mr. LUKEN. Anything further from the members?

[No response.]

Mr. LUKEN. If not, we will proceed with the first witnesses, Mr. Daniel Oliver, Chairman of the Federal Trade Commission, whom we welcome this morning. Mr. William MacLeod, who is the Director of the Bureau of Consumer Protection.

Mr. Oliver, you have submitted a statement which without objection will be admitted into the record. You and Mr. MacLeod may proceed to acquaint the subcommittee in any way you see fit with your views on the issues that have been raised this morning.

STATEMENT OF HON. DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY WILLIAM C. MacLEOD, DIRECTOR, BUREAU OF CONSUMER PROTECTION

Mr. OLIVER. Thank you, Mr. Chairman, members of the committee. We were originally asked to be here today to discuss authorization of the Federal Trade Commission. I think it is unfortunate that consideration of authorization has been postponed in order to discuss the unanimous decision the commission made almost 3 months ago to close the cigarette laboratory.

The commission has provided the subcommittee with a statement on this subject. In addition, we have provided both responsive documents and written answers to the questions presented to us as late as last Friday.

Mr. LUKEN. Did you submit anything to the committee before last Friday?

Mr. OLIVER. I believe we have submitted reports on why the cigarette laboratory was closed; yes.

Mr. LUKEN. When was that?

Mr. OLIVER. We received the request for documents on Friday.

Mr. LUKEN. Pardon me for interrupting.

Mr. OLIVER. I believe the documents have been submitted.

Mr. LUKEN. In your presentation, I thought there was an inference that the subcommittee had been advised some time ago as to the closing of the lab.

Mr. OLIVER. I believe Congress was made aware 3 months ago, roughly 3 months that the laboratory had been closed.

Mr. LUKEN. I apologize. We will go into that in the questioning. If there is some notice here, I would like to be looking at it while you are testifying.

Mr. OLIVER. As those materials show, on February 13, 1987, the commission voted unanimously to terminate the cigarette testing laboratory. The information produced by the laboratory duplicates data obtainable from other sources. Government facilities are available to verify that information. In addition, the cigarette companies themselves have every incentive to test their rivals' products to ensure their advertised claims are accurate.

The commission saw no benefit to consumers in continuing to expend taxpayer dollars on the laboratory. Those taxpayer dollars can be deployed more effectively in other law enforcement activities.

The FTC notified the appropriate committees and Members of the Congress after the commission's decision was made, and the House and Senate Appropriation Committees approved the commission's action. The cigarette laboratory has since been closed.

As I have already said, I regret that this small matter, undertaken without controversy and without objection has displaced discussion of the FTC's authorization, which was supposed to take place today.

Mr. William MacLeod, on my left, the Director of the Bureau of Consumer Protection, is very familiar with the details of the former laboratory's operation. If there are any questions, we will attempt to answer them.

[The prepared statement of Mr. Oliver follows:]

STATEMENT OF FEDERAL TRADE COMMISSION

I am happy to be here today to present the commission's statement regarding its decision to terminate its in-house cigarette program. The commission staff's review of the continuing need for our facilities began in 1982. During its review, staff consulted with representatives from the Surgeon General's Office, the Office of Smoking and Health, the National Cancer Institute, the major health groups, the tobacco industry and Congressional staff members.

The commission unanimously voted to close the Cigarette Testing Laboratory on February 13, 1987. That decision was based not only on the present costs of running the laboratory and the additional funds that would be required in order to update and maintain the laboratory, but on the fact that those costs would be incurred even though the same information is currently being generated by the cigarette industry and can be obtained from it at little additional cost to the government. On February 19, the commission sent letters to the Chairmen of the Senate and House Appropriations Committees notifying them of its decision. On March 27, the Senate Appropriations Committee orally notified the commission that it had no objections to the closing of the laboratory. By letter of April 9, the Chairman of the House Appropriations Committee notified the Commission that he also had no objections. After receiving these approvals, the commission formally announced the closing of the laboratory on April 15, 1987.

In 1966, the commission initiated several actions for the purpose of encouraging cigarette manufacturers to provide consumers with accurate comparative information concerning

the tar and nicotine content of the cigarettes that they smoke. In that year, the commission ended a 6 year ban on tar and nicotine advertising, adopted a uniform testing system measuring tar and nicotine content, and sent a letter to the domestic manufacturers approving their dissemination of tar and nicotine claims, if such claims were supported by tests conducted in accordance with the approved method. In 1966, the commission also created the Cigarette Testing Laboratory to facilitate the dissemination of tar and nicotine information pursuant to this uniform testing standard, and begin to provide the results of its testing periodically to Congress. Since 1971, the cigarette industry has included tar and nicotine ratings in all advertising companies. The current voluntary agreement among the companies requires the companies to test new and reformulated cigarettes for tar and nicotine between commission testing periods using the Commission standards. In addition, the companies often test each others brands for accuracy.

Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. In addition, the Tobacco Institute Testing Laboratory (TITL), a private laboratory run by the cigarette industry, does tar and nicotine testing. The methodology, procedures and processes that the companies and TITL use are identical to those that the commission has followed. The equipment used by TITL is practically identical to the equipment that the commission has used, except that in many cases the equipment is newer or is automated.

I wish to emphasize that the closing of our in-house facilities will not significantly affect our ability to ensure the accuracy of tar and nicotine claims. Indeed, the commission has only recently completed a vigorously contested litigation involving the accuracy of tar and nicotine claims made by a major manufacturer. Importantly, that case arose not as a result of commission testing or monitoring but because of a competitor's complaint. The commission will continue to

monitor advertising for deceptive tar and nicotine claims and bring appropriate enforcement actions. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we will hear quickly from its competitors. In addition, we will continue in the future to collect tar and nicotine ratings from the companies and report that information to Congress. As with all data that we collect from the cigarette companies, we will scrutinize the ratings for accuracy and reliability. If we should have a question about any individual rating, we have access to testing facilities at Oak Ridge National Laboratory.

In sum, the commission established its laboratory in order to facilitate the use of a standardized methodology for the testing of the tar and nicotine content of cigarettes. In this regard, we have been highly successful, for the procedure followed by all the companies is the one used by the commission and is in fact called the "FTC method." Having established the commission's methodology as a uniform testing standard, the commission concluded that there was no longer a need for the Federal Government to duplicate the testing program already being conducted in the private sector, which provides the same information. We have every expectation that accurate tar and nicotine information will continue to be provided to consumers without the unnecessary expense of governmentally supported testing. If for any reason that expectation proves incorrect, we are prepared to take vigorous corrective action.

Thank you.

Mr. LUKEN. Mr. Oliver and Mr. MacLeod, would you say that the FTC method for testing, that is a term of art now, the FTC method, isn't that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. I believe you have said before this is one of the principal missions of the lab, to develop a method of testing cigarettes; is that right?

Mr. OLIVER. That is correct.

Mr. LUKEN. Is that the only purpose of the lab, testing a method? It was also the purpose of the lab to actually test the cigarettes; isn't that right?

Mr. OLIVER. Yes. Obviously, we tested the cigarettes. The lab tested the cigarettes after the method was established. Since that time, the method has become the standard method and it is used both by the cigarette companies themselves and by the government facility in Oak Ridge, TN.

Mr. LUKEN. That method is a very useful tool that we now have for protecting the consuming public, the public consuming cigarettes; is that right?

Mr. OLIVER. That's correct.

Mr. LUKEN. Therefore, the laboratory, the facility has been very instrumental in developing a method. If we cancel the laboratory, if the laboratory is history, we would be denied the benefit of possibly a new method being developed, such as the method which this laboratory has developed. Would you agree?

Mr. MACLEOD. Mr. Chairman, if I may, I would like to address that question. The laboratory itself was established as you asked, to try to establish a standardized methodology for testing cigarettes. Indeed, the lab accomplished that. The method that the lab is using today is not significantly different from the method that was established in 1966.

The individuals using the lab are primarily or were primarily operating simply the testing function. The kind of scientific research that would go into developing new and improved methodologies is the kind of research that is be-

yond the capability of the employees we have at the Federal Trade Commission.

Mr. LUKEN. Shouldn't we be working to develop the abilities of the employees that you have at the Federal Trade Commission rather than consigning the operation which has been very beneficial to the ash can?

Mr. MACLEOD. Mr. Chairman —

Mr. LUKEN. I don't think you have stated before that is the case, that you had the choice of either improving the lab, making it more effective or of closing it. Now you have been saying that you closed it because the work can be done by other agencies or private agencies.

Mr. MACLEOD. The Federal Trade Commission is virtually entirely an agency of economists and lawyers. We are not an agency of scientists. We do not do general testing of various products. We cannot pretend to have the expertise to improve or come up with a state-of-the-art testing on any of the advertising that we regulate in the course of our enforcement priorities.

What we have done and what we continue to do is examine the scientific community and seek comments and advice on whether the method that we are using can be improved, whether it should be improved, whether we can agree upon better methodology to test cigarettes. I suspect that research will never end, but we certainly do not have the capability at the Federal Trade Commission. This is a very sophisticated and very expensive scientific process and the kind of process I would expect would be better undertaken either by private researchers or government facilities that have much better scientific abilities than we at FTC.

Mr. LUKEN. We have just established that this lab has developed the FTC method, which the FTC has taken credit in the past for and it has been generally recognized that the

FTC method of testing cigarettes is the one that is used universally now; isn't that right?

Mr. MACLEOD. The lab established for the purposes of the Federal Trade Commission the methodology which itself was not developed by the Federal Trade Commission. We implemented a development, the Cambridge testing method, which was a product of the scientific community generally. As any research product, it is a culmination of many efforts by many scientists around the country to determine the precise and best means of testing a cigarette. That was done over 20 years ago. So far, that is the methodology that we are still using at the Federal Trade Commission.

Mr. LUKEN. These companies are not required by law or regulation to use this FTC method; are they?

Mr. MACLEOD. No, they are not. If they advertise that they use the FTC method, of course the laws of deception would require they actually use the FTC method.

Mr. LUKEN. What if a company wanted to change its testing procedures? Would it have to obtain approval from the commission or at least demonstrate that its method is equivalent to the commission's testing method?

Mr. MACLEOD. In the litigation that arose from the Barclay cigarette issue of a few years ago, in which there was a question as to whether the FTC testing methodology accurately tested the tar and nicotine delivery of Barclay cigarettes, that issue was addressed by the courts. The answer that the courts gave was we cannot force a company to use nor can we approve in advance the kind of testing a company uses. We can make sure that the testing a company uses is an accurate test, especially as that accuracy relates to the FTC method. The court decided the company could not simply indicate—

Mr. LUKEN. Hasn't there practically been an uniformity in using the FTC method?

Mr. MACLEOD. There has practically been uniformity but we recognized in the Barclay case that the FTC methodology does not accurately measure the tar and nicotine delivery of that particular cigarette.

Mr. LUKEN. That particular cigarette, because of other reasons. If one of the tobacco companies developed an improved testing procedure, which provided more accurate information, wouldn't this destroy that uniformity? Now that we don't have a laboratory that is the standard.

Mr. MACLEOD. I would fully suspect that, perhaps by the year 2000, there will be a methodology in the U.S. that is an improvement on the methodology that we use at the FTC.

Mr. LUKEN. Leaving it up to the tobacco companies to do the testing, leaving this health procedure to the tobacco companies which deny basically there are any health considerations in smoking cigarettes, the tobacco companies are going to come up with a new methodology? Is that what you are saying?

Mr. MACLEOD. There is intense competition to measure this kind of information and measure it accurately.

Mr. LUKEN. Intense competition in the tobacco industry; is that right?

Mr. MACLEOD. There is no question about that.

Mr. LUKEN. That has been historically true; right? If we look at the point in history of where tobacco companies are today, they are under seize, are they not? If tobacco companies are under seize from the public and by Government, they just might have a tendency to ban together, to conspire, to collude, to be concerned more about the industry which is in danger of being wiped out, than to be worrying about their petty differences in competition with other companies. Might that not be the case?

Mr. MACLEOD. As it has been said in other contexts, I would be glad to see that. They could go ahead and make my day. I have a number of lawyers who enforce advertising law and we have a bureau that enforces the competition laws of the United States, and if that kind of activity were undertaken, they would be subject to prosecution by the Federal Trade Commission.

We have relied on complaints from the industry in the past and it has worked.

Mr. LUKEN. Why don't you depend upon cigarette industry lawyers, if you want to depend on cigarette company laboratories, rather than your own lawyers? I might be making a rather broad comparison or analogy. You are saying we should depend upon cigarette company laboratories and their testing methodology and the forces of competition. Why don't you depend upon their lawyers? Why should we pay lawyers for the FTC? Why shouldn't we depend upon the lawyers of Brown and Williamson to contend with the lawyers of the other companies and go ahead and fight it out in civil court? Why should we even sustain the FTC, according to your theory that we ought to allow the laboratory studies to be made by the companies and on the theory of competition?

Mr. MACLEOD. There are several answers to that, Mr. Chairman. I would like to elaborate first of all on the answer that I gave. We do have in place the measures that will allow us to check, to find out whether the truth is being told. Those measures are the same kinds of measures that are used by the FDA, and the Department of Transportation, in checking the accuracy of measurements of constituents, and the performance of products those agencies regulate.

It is generally the case in the regulation of measurements of performance and constituent standards that the Government leaves it to the industry with appropriate checks and balances upon the performance that the industry reports.

We would have a multi-billion budget if we had to test independently the substantiation for the advertising of every product we regulate.

Once again on the competition issue, I think it is important. We are not relying upon the lawyers. We are not relying upon the companies. We are relying upon the forces of competition that will make sure that one company will not try to get a leg up on another company with a false or deceptive claim of tar and nicotine delivery. That is precisely the way the Barclay litigation resulted.

Our machines were fooled by the Barclay measurements. We did not know, even though we were testing the cigarettes, that the cigarettes delivered a different measure of tar and nicotine until competitors came in and told the Federal Trade Commission there was a problem. That is how that case began.

Mr. LUKEN. Does every tobacco company have a laboratory?

Mr. MACLEOD. Every tobacco company either has a laboratory or has access to laboratories that it uses on a regular basis.

Mr. LUKEN. Those might be considered weasel words, "or has access to," like the Tobacco Institute?

Mr. MACLEOD. The Tobacco Institute does have a laboratory as well.

Mr. LUKEN. The companies that have access to laboratories, one of those laboratories they have access to is the Tobacco Institute. Isn't it your anticipation the Tobacco Institute laboratory will be utilized by the companies?

Mr. MACLEOD. Yes, indeed, we expect it to. We expect to pay regular visits to the Tobacco Institute laboratory.

Mr. LUKEN. The Tobacco Institute doesn't foster competition between companies within the tobacco industry. It is an institute which is an industry facility; is it not?

Mr. MACLEOD. Yes; it is.

Mr. LUKEN. You are relying upon the Tobacco Institute facility to replace at least in part the FTC laboratory? The Tobacco Institute represents the tobacco industry, which we could hardly rely upon to give us trustworthy information about the health effects of tar and nicotine in cigarettes; isn't that right? Would you rely upon the Tobacco Institute to give you accurate information? Would you trust it?

Would you trust the Tobacco Institute's laboratory to give you reliable information on the health effects of tar and nicotine in cigarettes? Is that a fair question?

Mr. MACLEOD. Yes; that's a fair question and I will be glad to answer it. If the Tobacco Institute were the only alternative to the FTC testing laboratory, we would not have recommended closing the laboratory and I suspect the commission would not have voted to do so. The Tobacco Institute's laboratory is only a small part of the mechanism that we can rely upon to ensure that there is accurate reporting of tar and nicotine numbers to the public.

Furthermore, we will be paying visits, as I indicated earlier, to the Tobacco Institute, just as our fellow regulatory agencies pay regular visits to the testing facilities of other companies in other industries to make sure that the FTC methodology is being used. With this methodology, which itself is very standardized—there is not much room for cheating. It is a very mechanical, a very routine and a very certain process.

Mr. LUKEN. You are going to be making visits and you have described your FTC as lawyers and accountants and other kinds of specialists, but not laboratory technicians or scientists, but you are going to be making visits to make de-

terminations on these scientific issues, without the assistance of a laboratory to back you up, without the scientists to back you up; is that right?

Mr. MACLEOD. No. The scientists that I mentioned, that the FTC does not have in abundance, are the kind of scientists that we can expect to engage in the sort of original research that would develop improved methodologies and find the next generation of accurate testing, if anyone were to find that generation.

We do have in our employ the individual who ran the testing laboratory and while that individual is about to retire, we can use him until then and we do have access to independent scientists that we use on a contract basis.

As a matter of fact, Mr. Chairman, in the Barclay litigation, the Federal Trade Commission relied upon experts, independent experts that we found, as we often find in any kind of litigation, who could verify the testing that was being done for that litigation and make sure that the testing being done and the numbers being reported in the course of that litigation were accurate. We definitely have access to the kind of expertise that we can use to ensure accuracy.

We don't have the kind of budget to hire these people and have them as full time employees.

Mr. LUKEN. It seems to me that what you are saying is you are depending on the present picture, the present structure in the industry, but once you disband or you have disbanded and if you don't reinstitute the laboratory, you are not going to have the scientists to back you up, you are not going to have the procedures, you are not going to have the ability to make these tests, and in the future the tobacco industry is going to govern. They can develop the Tobacco Institute laboratory, the tobacco companies can decide to use the Tobacco Institute, and all you can do is come in and monitor because you can't administer any competing tests or develop any competing methodology.

But let me ask you one more question. I don't want to take up all the time here. I would like your comments. I refer to a Consumer Reports of January 1983, and would you comment on this statement? In reporting on the controversy of the Barclay case in Advertising Age, a top tobacco executive commented, "Every company in the cigarette business knew how to make a product that would fool the FTC machine. None of us had the nerve to take the chance B&W has taken. So far the Barclay filter has been a very successful marketing tool."

Mr. MACLEOD. I have two comments on that, Mr. Chairman. My first comment is Barclay tried and the FTC caught them. My second comment is that to the extent Barclay is successful, it is now being advertised with accurate tar and nicotine figures and it could well be that at those advertised figures, the Barclay product is a product that still generates consumer demand.

I would like to respond to your last question because I would not want to leave a misunderstanding as to our access to facilities. There is a government testing facility at Oak Ridge, TN with which we can generate competing information and which we can use and have used in the past to generate accurate technical information regarding tar and nicotine figures. That equipment, in fact, is more modern than the equipment we have at the Federal Trade Commission, so we do have the backup capability to generate competing data.

Mr. LUKEN. Are nonmembers allowed to use the Tobacco Institute's testing facilities, do you know?

Mr. MACLEOD. Yes, they are.

Mr. LUKEN. So the whole industry could use it?

Mr. MACLEOD. Yes, as far as I am aware.

Mr. LUKEN. From this testimony, my preliminary observation is that we might consider the alternative that you had,

which is to improve the laboratory, improve the facility rather than consigning it to history.

I have utilized my time and I will yield to the gentleman from Kansas.

Mr. WHITTAKER. Thank you, Mr. Chairman.

I would hope that in the course of this morning's hearings we might even have a chance for a second round because I think you are pursuing an excellent line of questioning.

Mr. Oliver, I would like to direct my first question to you. One of the main objectives of today's hearings is, of course, to review the FTC's enforcement of the prohibition against false advertising as it relates to cigarette advertising and unfair methods of competition as that prohibition relates to the cigarette industry. Earlier this year, you testified before this subcommittee on legislation that would ban all cigarette advertising. At that hearing, it was alleged that large, diversified companies which owned tobacco companies are using their ability to purchase a great number of advertisements to pressure newspapers and magazines not to run public health advertisements about the health risks of cigarettes. It was even suggested that these companies discouraged the placement of cigarette ads in certain sections of the newspaper, such as up next to obituaries or up next to other health-related stories.

Has the FTC ever looked into such allegations as an unfair method of competition?

Mr. OLIVER. I am not aware of any. It is possible they have before I got there, but I am certainly not aware of any. To the extent that what is involved is editorial judgment of the paper in question, I doubt that we would have jurisdiction.

Mr. WHITTAKER. I would have to question your logic on that, Commissioner, because if anything, when tobacco com-

panies buy up Nabisco and General Foods and other consumer products unrelated to tobacco, and then, from the collective purchasing power of their advertising, tell the newspaper up front that they cannot run health stories or place those ads up next to health stories, or up next to obituaries, or they will have those ads cut, I would see that as unfairly competing with the public's right to information.

Mr. OLIVER. That could be. We have received no complaints on that score, and my guess would be that if that were a standard practice going on for any length of time, the commission would have received some kind of complaint on it. Anything is possible, but it is hard to think that that kind of activity could be kept secret. It is hard to think anything can be kept secret over any considerable period of time, and I would suppose that by now the Federal Trade Commission would have received some kind of complaint on that score. To my knowledge, we have not.

Mr. WHITTAKER. Could I assume, then, that you are leaving the door open for someone to bring this information to you, to file a complaint, and that the Commission will then conduct an investigation?

Mr. OLIVER. I would think so, yes.

Mr. WHITTAKER. We all know that cigarettes as well as many other products have very negative health effects. Does the FTC view its role as determining or informing the public about those health effects?

Mr. OLIVER. Our role is to make sure that such advertising as is done is truthful. Of course, as we know, the Surgeon General's warning which is on all cigarette ads and cigarette packages has penetrated to something like 90 percent of the community. Polls show that 90 percent of the people understand that smoking is, in fact, hazardous to your health. Our job is not to present the information; our job is to make sure that such advertising as takes place is accurate.

Mr. WHITTAKER. Is truthful.

Mr. OLIVER. Yes.

Mr. WHITTAKER. So you do not see your role as that of warning the public about the health effects of cigarettes. If that be the case, then, isn't it the role or wouldn't it more appropriately be the role of agencies such as the Food and Drug Administration or commissions such as the Consumer Product Safety Commission to warn the public about the dire health and safety dangers?

Mr. OLIVER. I think the Department of Health and Human Services has that jurisdiction, not the FTC.

Mr. WHITTAKER. Please respond to my question. Do you see a role for the FDA and, for that matter, the Consumer Product Safety Commission? If they are concerned about something that could take 20 lives in a year, here is an issue that takes 350,000 lives a year.

Mr. OLIVER. Mr. Whittaker, that could certainly be true. I haven't thought about the matter, so I really couldn't give you a definitive answer, but that could certainly be true.

Mr. WHITTAKER. I am just curious. When the Commission began to consider shutting down the testing program, did you explore, the possibility of some other Federal agencies taking over this role?

I think there is a legitimate concern, and the Chairman expressed it, too, about putting the fox in charge of the chicken house, of letting just the tobacco companies themselves monitor their own progress. Did you explore with the Food and Drug Administration or the Consumer Products Safety Commission the possibility of their taking over cigarette testing?

Mr. OLIVER. Let me say first of all that I will let Mr. MacLeod answer that. I think we did not, but he may know better than I do. But I want to go back, if I may, and respond

to something else you said. I don't see in any way that we are abandoning the field to the nefarious cigarette companies to distort the data. I think there is a misimpression that that is the result of or will be the result of the FTC's decision to close down the laboratory. I think that is incorrect, and I think it certainly misreads the material that we have sent to the Congress.

Our point is that testing will continue, it will continue both by the industry itself—which does not test as an industry but as individual rivals within a particular industry testing both their own and their rivals' products—and in addition to that, we always have the option of going down to the government facility in Oak Ridge, TN and checking up, on any kind of basis we like, on the information that has been provided by the cigarette companies.

So we are not simply abandoning the field. We are trusting to some extent to competitive forces in the marketplace, rivals making sure that their rivals' product testing has been done accurately, and then we also have the ability to spot check at Oak Ridge, TN, a Government facility.

I think that the idea that somehow we are simply abandoning this to the industry, which will instantly collude to produce joint numbers, is very mistaken. I think the $200,000 we have can be deployed more effectively in other law enforcement activities.

Mr. WHITTAKER. I appreciate your comments but I would still like a response to my question. Did you contact either the Food and Drug Administration or the Consumer Products Safety Commission to see if they could take over the testing program?

Mr. MACLEOD. Thank you, Mr. Whittaker. Yes, indeed, we have talked with a number of other Government agencies over the years.

Mr. WHITTAKER. Please identify them.

Mr. MACLEOD. We have spoken with FDA, we have spoken with FDA, and—

Mr. WHITTAKER. How about the Consumer Product Safety Commission?

Mr. MACLEOD. The Consumer Products Safety Commission has no legal jurisdiction over cigarettes now, so for them to have an interest in the matter would probably require some kind of legislation.

Mr. WHITTAKER. Do you assume, then, that the BATF and the FDA currently have jurisdiction?

Mr. MACLEOD. Pursuant to a liaison agreement with the FDA, the FTC has primary jurisdiction over advertising: There is an interest in those agencies. As a matter of fact, the FDA has expressed the desire and has agreed to take some of the equipment that we have in the cigarette lab. They do have some uses for—

Mr. WHITTAKER. Recently they have done that?

Mr. MACLEOD. Yes, indeed, since we have closed the lab. Our responsibility now is to find the proper disposition for the laboratory equipment, and the FDA has agreed to take that equipment, some of the equipment from us.

Mr. WHITTAKER. Have you had any communication from FDA that they consider it within their purview to begin assuming some of this responsibility? I find that encouraging.

Mr. MACLEOD. No, we do not have that now. There are a number of Government agencies over the years that have expended a tremendous amount of resources in educating consumers. The Surgeon General, of course, comes to mind, and there are a number of other Government agencies. As a matter of fact, the Federal Trade Commission in its involvement with the advertising—the rotational warnings of cigarettes today, and the earlier Surgeon General's warning on

cigarettes, were all matters that had the deep involvement of the Federal Trade Commission, and this is now an education program that is going on with every single advertisement that is run in the media every day. So there is a great deal of consumer education that is actually going on now. It is largely embodied in the legislation governing the cigarette industry.

Mr. WHITTAKER. Do you recall offhand who it was within the FDA that you had your initial contact, with or did they contact you?

Mr. MACLEOD. No. We don't have an expression from the FDA that they are expressly interested, and I cannot answer right now whether they have jurisdiction precisely over the issue. Our reading of some of the law—and as I say, we are not FDA experts here—is that their jurisdiction would not extend to smoking. Their interest in some of our equipment has applications beyond that of smoking, and they could easily use the equipment for their other scientific methods.

So I am not sure whether there would need—I would be glad to provide an answer to the committee for the record, but I am not Fire right now precisely the extent of their jurisdiction and whether it would allow them to take up the responsibilities.

Mr. WHITTAKER. Mr. MacLeod, I must confess that I am aware that through, either historical accident or very devious design, the FDA and the Consumer Product Safety Commission have been prohibited from addressing one of the greatest health risks this Nation has ever faced, tobacco products. It is ironic that the tobacco lobby and its forces were so successful in the early years in removing these products from the logical jurisdiction of those Federal agencies who are empowered to protect human health and well being.

I was in a sense hoping that you would share your insight as to whether you thought that was truly appropriate and if you would lend your support to the FDA or the Consumer Products Safety Commission being given jurisdiction over

tobacco products—even though we may have to legislate it from this level.

Mr. MACLEOD. The Agency with which we have had the most conversations has been the BATF. They have been the ones who have expressed interest in the past. However, our most recent conversations with BATF have indicated that they are not interested in assuming these functions. I would hesitate to give you a legislative recommendation on behalf of the Federal Trade Commission.

Mr. WHITTAKER. I think that many on this panel acknowledge, and for that matter, the American public, that tobacco consumption and addiction is a very, very, serious problem. Tobacco is a drug and it is only logical that as we proposed through our hearing, that we begin to consider allowing the FDA to have jurisdiction over these products.

Mr. FLORIO (presiding). The time of the gentleman has expired.

Let me, Mr. Chairman and Mr. MacLeod, make two observations and then ask a couple of questions. One observation follows up on the gentleman from Kansas' observation. I know of my own knowledge that there are Members, particularly on my subcommittee that has jurisdiction over the Consumer Products Safety Commission, that are pointing to this action that the commission is taking—that is, the FTC is taking—so as to justify, if there was a need for justification—to introduce legislation to modify the Consumer Products Safety Commission jurisdiction so as to specifically give that commission authority to deal with tobacco and tobacco products.

So it may very well be that your action is going to fuel the interest in providing at least some Agency. As the gentleman, Mr. Whittaker, stated, there is virtually no Agency that has any jurisdiction over this area.

The second observation would be that your line of explanation as to why you feel comfortable with competitors out there in a sense being counted upon to tattle on someone that goes and does something inappropriate in terms of advertising may not be appropriate in the tobacco field. I suspect there is no problem with one cleaning product telling on somebody else, saying that the "whiter than white" is really not justified, but when you talk about tobacco products, potentially you can have one company telling on another company in a way that goes to the very viability of the industry. That is clearly not the case with toys, that is not the case with regard to cleaning products.

So I think the analogy and the free marketplace theory breaks down when you are talking about the whole question of cigarettes and health impacts that may not be reported correctly between the various competitors.

Mr. OLIVER. May I respond to that? Just recently we had a case in which precisely what you are saying is unlikely to happen did happen. One cigarette company came in and tattled on another cigarette company. The product in question had, if you like, fooled the FTC's testing machine and fooled the FTC. A rival company came in, told us about it, and we brought an action against the company that produced the cigarette that had fooled the machine.

Mr. FLORIO. The nature of the deficiency was what? The effect that was tattled upon.

Mr. OLIVER. The way the filter had been constructed produced a result in the machine which was different from the result that you actually got from smoking. So one company came in and tattled on another one. That is competition.

Mr. FLORIO. If deficiencies in the product and the advertising go to the question of, in a sense, advertising that there is a basic health problem associated with any of the brands, do you really expect somebody else to be in saying that ciga-

rettes, in accordance with this degree of advertising, this particular brand is going to cause a serious health problem?

Mr. OLIVER. But that is not what the cigarette testing lab does. The cigarette testing lab tests the tar and nicotine content of cigarettes. It doesn't test the general health of or measure whether smoking is dangerous to your health. The Surgeon General has said that. So the cigarette lab has nothing, it seems to me, whatsoever to do with what your concern is. In terms of competition, competition did come in and tattle on the competition that their cigarette product was not as advertised.

So we brought a successful case precisely on the information brought to us by a rival company.

Mr. FLORIO. Let me shift very briefly to get the commission's position with regard to the provision in the Senate authorization that will eliminate the commission's authority to deal with unfair advertising. Is the commission supporting that?

Mr. OLIVER. The commission has supported that as a way, we hope, of increasing the speed with which authorization legislation could get through Congress.

Mr. FLORIO. That is the justification?

Mr. OLIVER. Well, and also we—

Mr. FLORIO. How about the merits? Do you feel comfortable not having unfair advertising jurisdiction?

Mr. OLIVER. Yes, although I might not have thought myself to put that limitation in, but the commission has discovered over the years that conforms rulemaking has not been an efficient way to regulate advertising. This restriction goes to rulemaking, not to bringing individual cases. Because rulemaking has proved, I think, to be little used and not terribly successful, it is the Commission's feeling that very little is given up by this restriction.

Mr. FLORIO. Let me make two observations. One, I am intrigued by your thought that you can expedite the process by supporting the exemption of unfair advertising inasmuch as that was the single item that held up the conference report being approved, the conference report being formulated in the last session of the Congress. Everything else was resolved. That one issue was the issue that stopped the reauthorization for the first time. So I am not sure your premise is correct, if that is your premise.

More importantly, we will be left with no authority for the FTC to take action in those instances that are not overtly deceptive and yet tradition has regarded as sufficiently offensive to be acted upon under unfairness jurisdiction. For example, your staff prior to your coming into office has in the past suggested that there be rulemaking when there was a conscious determination that some advertisers were targeting youth groups for alcohol consumption. There have been recent suggestions and I have a quote in the paper about recent cigarette advertising is seen as targeting young people.

This whole idea of something less than a fraudulent, deceptive representation, that nevertheless is regarded as unfair. If there is a basketball player standing there smoking saying, "I've been smoking since I was 17 years old and I've got 30,000 points that I've scored," that would be something that would not be deceptive and yet the sense is that that is the type of activity that you ought to have jurisdiction to deal with.

Mr. OLIVER. But we do have jurisdiction to deal with that in an individual case, and if we haven't even brought an individual case on it, then we would say that the activity is not prevalent in the industry.

Mr. FLORIO. How do you deal with it if it is prevalent, though?

Mr. OLIVER. The FTC would not go into rulemaking unless it discovered that the activity in question was preva-

lent. In the case of the activity you mentioned, if the FTC has not even brought a single case, it seems to me fair to say that at least in the FTC's judgment, that action is not prevalent in the industry.

Mr. FLORIO. What you are advocating is that even if it is prevalent—

Mr. OLIVER. If I may finish.

Mr. FLORIO. No, let me just stay with that point. We have a time limitation. If the practice is prevalent—and of course, we are inclined to change the law so as to include prevalency as a test for rulemaking—if the practice is prevalent, you are saying that you still don't want rulemaking capability, rulemaking authority in unfair advertising instances.

Mr. OLIVER. No, that is not what I am saying.

Mr. FLORIO. Then tell me what you are saying.

Mr. OLIVER. What I am saying is that if the FTC has not brought a single case of the kind that you are talking about, then the FTC's judgment is that there is not even a single case out there, and if there is not a single case out there, then it is obviously not prevalent in the industry.

Mr. FLORIO. You are not responding to my question, though. My question is let's assume that there is a prevalent practice of unfair advertising, as your staff suggested to you, with regard to targeting college campuses for chug-a-lug contests. Let's assume that there is this prevalent practice. You are suggesting that if we eliminate rulemaking capability for unfair advertising, you will not have any ability to do anything, and I assume you are saying that is good.

Accept my premise. Prevalent practice of unfair advertising. You are exempting the advertising industry. What do you do?

Mr. OLIVER. Let me say two things, if I may. The first is that even if we had jurisdiction, and we do now, even given

having that jurisdiction, the FTC has discovered that rulemaking takes a very long time, and I think, therefore, it is more efficient to bring a single case against the first offender in order to stop the practice before we go to rulemaking.

It is interesting, perhaps, that the staff, while it may have suggested a rule, apparently never was able to bring a successful case against one of these offenders that it discovered. So if the staff felt that enthusiastic about a rule, why didn't the staff also bring sufficient activity to the Commission's attention so that a single case could be brought? If they didn't bring that, it suggests that there was not enough activity for a rulemaking.

Mr. FLORIO. Let me ask this, and I'll conclude and yield to someone else.

But I mean it's fairly clear that your bottomline conclusion is that even if you find a pattern of activity that constitutes unfair advertising, your position, as I understand you've just suggested it to us, in supported the exemption that's being advocated is that the process takes too long, and therefore you don't want any authority to deal with a pattern of unfair and advertising practices.

Mr. FLORIO. I don't know what that means. What do you mean? Whose compromise?

It has not been the law. You still have—

Mr. OLIVER. Oh, yes, indeed, we have it, and we will bring it, if we found a practice that was prevalent in an industry today; we could start a rulemaking if we had the authority. But the point is, if you find a case—in order to find something that's prevalent, you have to find at least more than one; you have to find more than one activity.

Mr. FLORIO. Fine.

Mr. OLIVER. And if you do—

Mr. FLORIO. What I'm suggesting is that you ought to have the authority to be able to go publish a rule prohibiting a pattern of unfair advertising.

Mr. OLIVER. What I am saying is, it is faster—everything the Commission has done has shown that it is faster to bring a single case than to go through rulemaking. Rulemaking—

Mr. FLORIO. Well, we're arguing in circles. But I think it's fairly clear—I think it's fairly clear that the policy that you're advocating is to totally take away—

Mr. OLIVER. No.

Mr. FLORIO. The authority of the Agency to not do things. I mean, we're going back to fundamentals of administrative law. Administrative law and rulemaking is not to have to go through case by case by case. The cases presuppose that someone's already been injured. The rulemaking process is to spell out a course of conduct, so that future instances will not occur.

Do you concede that rationale?

Mr. OLIVER. Yes, certainly. But there are more effective ways to do it.

I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better.

Mr. FLORIO. The case deals with the one instance. So you've got to go out and let all the consumers be injured one by one by one, and you, after the fact, bring the case?

Mr. OLIVER. In the case of the cigarette industry, which is what we're talking about, it is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to

make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers.

So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Mr. FLORIO. If we get to the point in the—there's going to be a reauthorization here; there will be a reauthorization in the Senate—if we duplicate what happened last session of Congress, that they have an exemption and we do not, how locked in concrete are you on this question of the exemption?

Clearly in the last session of Congress, you came down on the Senate side, and nothing happened. If you came down on our side on saying you should continue, and that promised the hope of having a reauthorization, is that anything we could conceivably receive from you?

Mr. OLIVER. I would expect so, although I would have to confer with my four colleagues, you understand.

Mr. FLORIO. Thank you very much.

Mr. LUKEN. The gentleman from Tennessee.

Mr. COOPER. Thank you, Mr. Chairman.

Mr. OLIVER. I would like to suggest first that you perhaps amend your written statement. You start off with the words, "I am happy to be here today." From your attitude and your brief statement earlier, I would suggest you edit that to be, "I am unhappy to be here today." And to be honest with you, I can't say that I blame you.

I have a couple of specific questions and then some more general ones.

Are you really looking at your budget so closely that other $200,000 items are being examined and cut, and if so, what are some of those items?

Mr. OLIVER. We look at the budget carefully all the time. If we find $200,000 that we think is not being deployed usefully, we would certainly make an attempt to switch it.

This is a case that has—the cigarette lab has been on the mind of the commission, I gather, for awhile. It has not felt that those dollar have been spent usefully, and whenever you do find dollars that aren't being spent usefully, it seem to me you should spend them more usefully.

Mr. COOPER. Can you think of any other examples right now of miniature expenditures like that that have been selectively cut out and eliminated by the commission.

Mr. OLIVER. Not offhand. I have not gone through the budget this week. But I'd be happy to respond to that.

Mr. COOPER. Well. I'd like that for the record.

Are you planning, then, to lower your budget request by $200,000 when we do get around to an authorization hearing?

Mr. OLIVER. We had not planned to lower the budget request by $200,000, but if you would like us to lower it by $200,000, I'd be happy to take that under consideration.

Mr. COOPER. Well, if you were not planning on lowering your request, how are you planning on spending the $200,000?

Mr. OLIVER. We will redeploy the funds in other law enforcement activity.

Mr. COOPER. That means you'll think of a way?

Mr. OLIVER. That will be added to the other law enforcement activities that the commission engages in, yes, unless you'd like to cut out the $200,000.

Mr. COOPER. Well, I might take you up on that.

Mr. OLIVER. Fine.

Mr. COOPER. How about cost of getting the work contracted out?

Mr. OLIVER. We estimate there will be some cost in monitoring the activities of the industry, as Mr. MacLeod has described, and I think our current estimate is something like $30,000 or $40,000 in order to get the kind of contracting we would need.

Mr. COOPER. This is for one study during a year, or is this for—

Mr. OLIVER. No. This would be for the annual activities. Maybe Mr. MacLeod would care to respond.

Mr. MACLEOD. Certainly. We have anticipated that we could spend somewhere in the nature of $40,000 in a year. These are not hard estimates, of course, because a lot would depend on what we found in the course of monitoring. In the Barclay case, we spent over $100,000 once we went into litigation in getting the information that we needed to make sure those ads were accurate.

But in the normal course of monitoring, we have allocated or we expect that we would have to have part-time of an attorney and occasional time of a chemist or an expert who would be able to go to other laboratories and see what is going on, and then occasional testing of cigarettes ourselves at a laboratory that we choose in order to make sure that we generate competitive information.

Mr. COOPER. Have you gotten a price quotation from any particular laboratory?

Mr. MACLEOD. Yes, we have some price quotations. The prices range from $3,000 to $9,000 per brand, depending on how many brands we test, and those prices generally are prices that we negotiate, and we use competition in that sector, too. We try to find where we can get the best testing for the best price.

Mr. COOPER. This Oak Ridge backup facility you've been describing, not your facility, but some other facility at Oak Ridge National Labs—and I should warn you, I am from Tennessee; that's not in my district—who pays for that facility at Oak Ridge National Labs?

Mr. MACLEOD. That is a facility that is under the budget of the Department of Energy. It is actually operated by private contractors to the Department of Energy, and it is available for the use of Government agencies that wish to use it.

Mr. COOPER. Why do they have smoking testing machines that are better than yours, or at least a machine?

Mr. MACLEOD. They have machines in which they have been able to spend money and improve the equipment that we have not been able to do.

I should emphasize that we do not question the accuracy of our machine vis-a-vis their machine. Their machine is more automated, has better computers, et cetera.

Mr. COOPER. Does DOE have jurisdiction over tobacco.

Mr. MACLEOD. Not that I'm aware of, no.

Mr. COOPER. How did they get a machine that's more automated and better at testing tobacco than your machines?

Mr. MACLEOD. These machines can test the substance—these machines have many components that test for many different constituents of smoke and chemicals, and I would be glad to provide for the record a historical account of how that Oak Ridge Laboratory ended up with a machine at that location. I don't have the precise history right now.

Mr. LUKEN. Would the gentleman yield?

Mr. COOPER. Yes, I'd be happy to yield.

Mr. LUKEN. Since you're not under any time constraint, I don't apologize for interjecting.

What I'd like to do, since I think other Members are also curious about that is suggest to the gentleman that he pursue this line of questioning. I think we would all like to know, among other things, what would be—since this facility is available, what would be the opportunity for the Federal Trade Commission to use it as a substitute laboratory.

Mr. COOPER. That's just my thinking. And it seems curious to me that of all the towns in the United States, that one particular town, a small town in one State, would have two of the best smoking testing machines in the country, one operated by one Government agency and the other operated by another that has no jurisdiction over tobacco.

Mr. MACLEOD. Well, cigarette testing equipment at the Oak Ridge Laboratory, I understand, was established to do contract work for the National Cancer Institute, and part of the explanation, I think, has to do with the reason why we believe the FTC is not as appropriate a place for this kind of work, because this is scientific work, and there is a great deal of synergy that scientists can take advantage of when they have these kinds of functions that they can share among other functions that they have.

Mr. COOPER. Does the Surgeon General of the United States share your opinion that you're not supposed to be in this line of testing?

Mr. MACLEOD. We have contacted, among the Government Agencies and health Agencies before we made the decision, individuals at the Surgeon General's office, and they have not raised any objection to our decision here.

I also do want to address the question that you put: Would we want to replace our testing with full-scale testing at the Oak Ridge facility? The answer to that, I think, is no; because the cost advantage of the Oak Ridge facility is a cost advantage that we can obtain by virtue of occasional contracts when we do want to test as a backup method.

If we were to use those kinds of contracts for regular periodic testing of many brands, the contract costs would probably exceed the cost that we had spent on the lab.

Mr. COOPER. I hope both of you gentlemen still have your current jobs when the figures come in. It would be interesting to see how the contract costs end up comparing with the costs of your current facility.

Are you aware of the foreign pesticide problem on tobacco?

Mr. OLIVER. Are you suggesting it will be higher or lower? I didn't understand your comment

Mr. COOPER. Well, I don't know what the answer will be. I just hope that you have your current position, so that when the figures do come in, you can either be congratulated for your business judgment or perhaps criticized, if the contract cost is in excess of your annual operating cost.

Mr. OLIVER. That would depend on how much you contracted out, obviously.

Mr. COOPER. Yes. Are either of you gentlemen aware of the foreign pesticide problem on imported tobacco?

Mr. MACLEOD. I have heard reports relating to the issue. We are not—it is not a matter that has been put to the commission specifically.

Mr. COOPER. I think it's really outside of your jurisdiction. It just seems that if there's a laboratory there with expertise in these matters, and there is a current problem due to the unknown nature of substances sprayed on tobacco leaves which we import from other countries, and about—what—one-third of our current cigarettes are composed of imported tobacco, that someone should be looking into this. And as I understand it, it is properly within the Department of Agriculture's jurisdiction.

But before you close down your facility, turn out the lights or tear it down, I would urge you to at least check with the Department of Agriculture to see if they have use for your type of facility before it's entirely dismantled, because it is an area tangential to your direct concerns, but still important to public health and safety, at least until we get final answers.

On the main question of the hearing today, it seems to me, here we have what's really a piddling expenditure in the big scheme of things—and while we all agree that saving every dollar is important—we have a piddling expenditure, and it's singled out, and the answer we're given is, "Oh, you can trust the tobacco companies," in particular in their furnishing of scientific information. And Mr. Oliver has already supplied us a single instance in which one company tattled on another, and I hope that's representative of industry practice.

But most oligopolies have a tendency, according to economic theory, which Mr. Oliver seems to delight in so much, most oligopolies have a tendency to collude.

And if you're talking about the specific area of scientific information, Mr. Oliver, would you say that the tobacco companies have competed against each other in supplying reliable, overall scientific information to the American public on the health dangers of smoking cigarettes? Have they competed against each other to be more accurate, more perceptive, more ahead of the curve, in supplying up-to-date, fair, accurate scientific knowledge to the American people?

Mr. OLIVER. When cigarette companies first started advertising their health claims back in the 1950's, they started making claims about their cigarettes, that they were essentially healthier than other brands, they were told by the Federal Trade Commission that they couldn't make those claims, because the commission concluded at that time, the Government concluded, that they were impliedly saying that cigarettes were, in fact, safe and healthy. So cigarette companies

which had been making health claims up until that time were dissuaded by the government from making any health claims.

So I think that to the extent they don't make health claims, it was the government that stopped them from doing that.

Mr. COOPER. Let's look at more recent times. Are you aware of any reputable scientific body in the United States which agrees with most tobacco companies' current health claims about the relative health or safety of their products?

Mr. OLIVER. I beg your pardon. Am I aware of what?

Mr. COOPER. Are you aware of any reputable scientific group in the United States that agrees with the health claims of current tobacco companies in this country?

I'm not talking here about specific tar and nicotine levels. I'm talking about the full-page ads that we've seen in various newspapers and other things that have come out of the tobacco community?

Mr. MACLEOD. Mr. Cooper, if I may, I would like to explain that the chairman has some difficulty answering a question like this, because he is currently sitting on the commission which has before it a matter in adjudication involving an advertisement that contains some health claims, so it is very difficult for the chairman to make a comment because of the possibility that it could indicate some kind of attitude or prejudgment of the merits.

Mr. COOPER. That's fair. I was not aware you were in current litigation.

But in general, I think that's the source of this committee's skepticism, that if you're having to litigate or take into adjudication some sort of a scientific claim on the part of a tobacco company, it doesn't exactly give us the fullest confidence that we can trust the companies.

We would like a watchdog, and we're worried when a piddling expenditure like this is denied. Perhaps your agency wasn't up to snuff. That's an argument to bolster it, though, not to eliminate it.

Mr. OLIVER. Except as we've indicated, we don't test—indeed, the Government does not do its own testing in regard to a variety of products and standards. The R-value rule, the appliance energy labelings standards, we don't measure the energy efficiency of appliances. We rely to some extent on competition, and we always have the option, as we've tried to indicate here, of contracting out spot tests at Oak Ridge and that just strikes me as a much more cost-effective way to monitor the industry.

Mr. COOPER. I would urge you to talk to the Surgeon General, because he, at least, doesn't view this as any regular sort of product. He views this as a major, if not the major, health threat that our country faces, aside from AIDS and a few other things like that, I suppose.

Finally, if I could ask this question, let's go along with your free market theory and let's have competition and let's assume that everybody is going to vigorously compete against each other in all ways—

Mr. OLIVER. Let's not make it too theoretical, after we've seen what happened to airlines after the free market took over.

Mr. COOPER. Well, let's concede the ideal question—great competition is functioning out there—should there be a bad actor in the field, would you favor a stiff penalty, perhaps, if one of the tobacco companies is found to have lied about its tar and nicotine content?

Mr. OLIVER. Yes, we'd bring an action against them, the way we do against any industry practice.

Mr. COOPER. What sort of penalty is assessed in a case like that? Is it a traffic violation type penalty, or is it one that

would really make a large, diversified company sit up and take notice?

Mr. OLIVER. Well, there are civil fines for noncompliances with rules and orders, and we try to make them—

Mr. COOPER. In what amount?

Mr. OLIVER. It would depend on the company and the circumstances. I don't think I could answer that here. But we try to make them sufficient to discourage the activity in the future.

Mr. COOPER. I have no further questions, Mr. Chairman.

Mr. LUKEN. The gentleman from Iowa, Mr. Tauke.

Mr. TAUKE. Thank you, Mr. Chairman.

I'll be very brief. I have people waiting in my office, but I wanted to make a couple of points.

First, could you provide to the subcommittee a listing of those laboratories which would be available that could provide the services that are currently provided, or were being provided by your own laboratory?

Mr. OLIVER. Yes, I'd be happy to do that.

Mr. TAUKE. Can you tell us how many that might be? Are there two, three, six, a dozen out there?

Mr. MACLEOD. I think that we've identified in the letter that we have submitted to the committee already four laboratories, five counting TITL, and I suspect that we could find more if we looked. There is also—as the chairman indicated, we will be glad to give a more detailed listing of locations and capabilities.

Mr. TAUKE. I appreciate that.

Mr. LUKEN. Without objection, the record will be held open for that.

Mr. TAUKE. Thank you, Mr. Chairman.

FEDERAL TRADE COMMISSION

CIGARETTE TESTING

Tar and Nicotine Content Results

The latest results of cigarette testing were published in the FEDERAL REGISTER on Monday, December 13, 1974, 41 FR 54221. Results of retesting of reformulated Parliament brand of cigarettes were published in the FEDERAL REGISTER on Friday, April 15, 1977, 42 FR 19225.

As a result of a request from Lorillard, the manufacturer of Kent Golden Lights Cigarettes, the Federal Trade Commission authorized its Tobacco Research Laboratory to conduct two retests of Kent Golden Lights: First, by inserting the cigarettes to the standard depth of 11 mm. into the cigarette holders of a cigarette smoking machine, and second, by inserting the cigarettes to a depth of 5 mm. At this time, the FTC rejects the results of the 5 mm. test as inappropriate in measuring tar and nicotine levels. The results by the standard 11 mm. method used by the Tobacco Research Laboratory were as follows:

[In milligrams per cigarette]

	TPM dry	Nicotine
Kent Golden Lights, king size, filter, soft pack	8	0.6

In testing cigarettes the FTC's Tobacco Research Laboratory routinely inserts 7/16" (11 mm.) into the cigarette holders on its cigarette smoking machine. Recent developments in ventilated filtration systems have raised the question of whether and to what extent of the depth of insertion should vary from the 11 mm. standard. An 11 mm. insertion would affect a ventilated filtration system that utilized that portion of the cigarette within 11 mm. of the tip, and therefore the "tar" and nicotine figures. Of special concern when considering any such modification of the standard 11 mm. insertion is

whether the insertion depth would and should be decreased beyond the point where consumers cover the cigarette with their lips, fingers, or both when they puff. The Commission believes that additional information is necessary before deciding whether further action should be taken in connection with this matter.

By direction of the Commission dated April 11, 1977.

JOHN P. DUGAN.
Acting Secretary.

* * *

FEDERAL REGISTER

Wednesday, April 13, 1983

* * *

FEDERAL TRADE COMMISSION

Commission Determination Re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications

Agency: Federal Trade Commission

Action: Announcement of Commission Determination, Amendment of Past Report, and Request for Comment on Possible Testing Modifications.

SUMMARY: This document announces the Commission's determination that the present FTC testing methodology does not assess accurately Barclay cigarettes and requests comment on possible testing modifications. In accordance with this determination the Commission is amending its March, 1983 *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268 (March 30, 1983).

ADDRESS: Comments should be filed in Room 130, Federal Trade Commission, 6th & Pennsylvania Avenue, N.W., Washington, D.C. 20580, no later than June 30, 1983.

FOR FURTHER INFORMATION CONTACT: Judith P. Wilkenfeld, Federal Trade Commission, Bureau of Consumer Protection, (202) 724-1499, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: In June, 1981 the Federal Trade Commission initiated an inquiry to examine allegations that its current "tar," nicotine, and carbon monoxide testing methodology, with the specifications as set forth in the Commission's announcements of July 31, 1967, 32 FR

11178, and January 18, 1979, 44 FR 3777, does not assess accurately Barclay cigarettes.

The Commission's inquiry has been assisted by extensive comments and scientific studies submitted by Lorillard, R.J. Reynolds, and Philip Morris, as well as Brown and Williamson, the manufacturer of Barclay cigarettes. The Commission also utilized three independent consultants to review the information submitted by these companies and make recommendations to the Commission and its staff. The consultants' reports were subsequently circulated to the companies for further comment.

Based on the information developed during the inquiry, the Commission has determined that its present testing methodology for "tar," nicotine, and carbon monoxide does not measure accurately Barclay cigarettes. The Commission has therefore determined it will not accept test results based on the current FTC method as substantiation for claims made about the "tar," nicotine, and carbon monoxide content of all varieties of Barclay cigarettes.

Without a new testing methodology, precise statements as to the appropriate "tar", nicotine, and carbon monoxide rankings for Barclay cigarettes are not possible: Independent estimates by the Commission's consultants for Barclay 80's and 85's, which are ranked by the present method as 1 mg. "tar" cigarettes, range from 3 to 7 mg. "tar." Similarly, the relative delivery of nicotine and carbon monoxide of these products is greater than suggested by the present FTC tests.

The Commission is therefore amending its March, 1983, *Report of "Tar," Nicotine and Carbon Monoxide of the Smoke of 208 Varieties of Cigarettes*, 48 FR 13268, by appending copies of this Notice to the Report. By this action, the Commission does not mean to imply that Brown and Williamson, the manufacturer of Barclay cigarettes, has violated any provision of the Federal Trade Commission Act for its past use and reliance on the FTC method to assess "tar",

nicotine, and carbon monoxide levels. Unless and until the Commission adopts a new testing methodology that is able to measure Barclay cigarettes accurately, however, future reports will not include test results for these cigarettes.

The Commission has further determined that there is a significant likelihood that the current testing method does not assess accurately Brown and Williamson's Kool Ultra and Kool Ultra 100's each of which uses the Actron filter design used in Barclay cigarettes. The Commission is today requesting comment on the following limited issues: (1) Are Kool Ultra and Kool Ultra 100's assessed accurately by the current FTC method? (2) If not how should these products be assessed?

The Commission wishes to reiterate that its "tar", nicotine, and carbon monoxide data are for comparative purposes only. How much "tar", nicotine, and carbon monoxide a particular cigarette delivers depends on the way it is smoked. "Tar", nicotine, and carbon monoxide delivery per cigarette will increase if the cigarette is inhaled more deeply, or puffed more frequently, by the smoker. If consumers who switch to lower yield cigarettes change their smoking pattern, for example, by smoking more cigarettes per day, they may receive a greater yield than suggested by the FTC test results.

All ventilated filter cigarettes pose a special problem. Many "lower tar" cigarettes achieve lower yields in part by use of a ventilated filter. Perforated holes or vents on the filter allow air to mix with the smoke during puffing, thus diluting the smoke and decreasing the yield. If the holes or vents are blocked, however, delivery will increase. Consumers will only achieve the relative "tar", nicotine, and carbon monoxide yields suggested by FTC tests for ventilated filter cigarettes if they avoid blocking the holes or vents on the filter with their lips or fingers while smoking the cigarettes.

If consumers avoid blocking ventilation holes, cigarettes smoked in the same fashion will yield "tar", nicotine, and

carbon monoxide in general accordance with their relative FTC rankings. The Barclay filter, however, poses a unique problem. Reduced ventilation when smoking Barclay apparently occurs inevitably and cannot be avoided by informed consumers except by use of a cigarette holder. Therefore, the Commission is taking this action to correct the "tar", nicotine, and carbon monoxide figures for Barclay cigarettes previously disclosed in the FTC's 1983 Report.

Based on the evidence obtained in this inquiry, the Commission decided in June 1982 to solicit comments on proposals to modify its testing machine so that the relative yields of all cigarettes, including Barclay, may be assessed accurately. The Commission prepared a statement that shows how it determined that it needed to explore possible testing modifications. The Commission's statement and the underlying evidence are now under seal by a court order. Several members of the cigarette industry who participated in the investigation had access to the evidence prior to the imposition of the seal. The statement and the evidence, if available, would be helpful to those parties who did not participate in the investigation in preparing informed comment in response to this notice. The Commission does not know whether or when the court order sealing the evidence will be lifted. Therefore, to avoid further delay, the Commission has decided to seek public comment now rather than waiting to see if the seal will be lifted.

The Commission is seeking comments on each of the following proposed holders for its testing machine:

(A) The MK 11 "Filtrona" holder, manufactured by Cigarette Components Ltd. of London and sold in the United States by American Filtrona Corp., Richmond, Virginia. This holder increases the pressure on the filter, thereby reducing air flow through the channels on the Barclay-type filter.

(B) A modified version of the Cambridge holder currently used on the machine, containing a ring of foam rubber

so as to abut the mouth end of the cigarette and block the exit channels on the Barclay-type filter.

(C) A cigarette holder designed so that one or more of the ventilation channels on the Barclay filter are blocked.

Each of these holders is intended to simulate the reduction in ventilation that occurs when humans smoke Barclay. The Commission has not yet determined whether any of these modifications are technically feasible and practicable, or whether some other modification will insure that all cigarettes, including Barclay can be ranked accurately.

The Commission also is requesting comments on the following specific questions and any other issues relevant to possible modifications of its testing methodology given the Commission's determinations regarding Barclay:

(1) Which of the proposed modifications, or what other modification, would yield the most appropriate test results for all cigarettes, given the Commission's finding in this matter and the consultants' estimates of Barclay's tar delivery?

(2) How quickly and easily, and at what cost, could the Commission implement each of the proposed modifications, or any other proposed modifications?

(3) Regarding proposal (C), which would more appropriately rank Barclay cigarettes—for example, a holder blocking two channels or one blocking three channels?

(4) Does the current FTC method accurately assess the relative "tar," nicotine, and carbon monoxide of Kool Ultra and Kool Ultra 100's each of which utilizes the Actron filter utilized in Barclay? If not, how should these products be assessed?

(5) Given the Commission's findings, what action other than modification of the testing methodology, if any, is appropriate?

(6) Would there be unintended consequences from modifying the cigarette testing method and/or machine? What effect might modification have upon possible innovation in the cigarette design?

(7) Should the Commission further examine the implications for its testing program of the issues raised by compensatory smoking behavior, including hole blocking, when consumers smoke lower "tar" cigarettes? What is the evidence that smokers use higher "tar" cigarettes differently than lower "tar" cigarettes? What is the evidence regarding the extent of hold blocking by smokers of different ventilated filter cigarettes? How does behaviorally reduced air dilution affect the relative rankings of various brands? Are there problems regarding compensatory smoking behavior which are significant enough to warrant further exploration of changes in the method, beyond those necessitated by the Commission's findings concerning Barclay? What lines of inquiry would generate the most useful information if such an examination is undertaken? For example, should the Commission explore a system of categories or "bands" of "tar" content rather than specific numerical estimates? Also, should consumers be advised that the cigarettes' actual "tar" delivery depends on how it is smoked?

In addition to responses to these questions, the Commission will carefully consider any additional research, such as studies of blood cotinine in smokers and air dilution in ventilated filter cigarettes, or other relevant information bearing on the appropriate relative rankings of these products.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

* * *

FEDERAL TRADE COMMISSION

[16 CFR Part 428]

[35 Fed. Reg. 12671 (Aug. 8, 1970)]

ADVERTISING OF CIGARETTES

Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., and the provisions of Part 1, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.11, et seq., has initiated a proceeding for the promulgation of a Trade Regulation Rule regarding the advertising of cigarettes.

Accordingly, the Commission publishes this notice and proposes the following Trade Regulation Rule:

§ 428.1 The Rule.

In connection with the sale, offering for sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties in milligrams of tar (to the nearest whole milligram) and nicotine (to the nearest one-tenth milligram) per cigarette, based on the most recently published Federal Trade Commission test results.

The testing methodology currently used by the Federal Trade Commission is the Cambridge Filter Method specified in the FEDERAL REGISTER notice of November 4, 1966 (31 F.R. 14278), as described in an article entitled "Determina-

tion of Particulate Matter and Alkaloids (as Nicotine) in Cigarette Smoke," by C. L. Ogg, Journal of the Association of Official Agricultural Chemists, Vol. 47, No. 2, 1964, and as modified by the Federal Trade Commission in accordance with the FEDERAL REGISTER notice of August 1, 1967 (32 P.R. 11178).

Where a finally adopted Trade Regulation Rule is relevant to any issue involved in any adjudicative proceeding thereafter instituted, the Commission may rely upon the Rule to resolve the issue: *Provided*, That the respondent shall have been given opportunity for a fair hearing on the applicability of the Rule to the particular case.

All interested persons, including the consuming public, are hereby notified that they may file written data, views or arguments concerning the proposed Rule with the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection, Federal Trade Commission, Pennsylvania Avenue and Sixth Street NW., Washington, D.C. 20580, not later than October 8, 1970. To the extent practicable, persons wishing to file written presentations in excess of two pages should submit 20 copies.

All interested persons are also given notice of opportunity to make oral presentations of data, views, or arguments with respect to the proposed Rule at a public hearing to be held at 10 a.m. e.d.t., on Thursday, October 15, 1970, in Room 532 of the Federal Trade Commission Building, Washington, D.C.

Any person desiring to present his views orally at the hearing should so inform the Assistant Director for Food and Drug Advertising, Bureau of Consumer Protection not later than October 8, 1970, and state the estimated time required for his oral presentation. Reasonable limitations upon the length of time allotted to any person may be imposed. In addition, all parties desiring to deliver a prepared statement at the hearing should file such statement with the Assistant

Director for Food and Drug Advertising, Bureau of Consumer Protection, on or before October 8, 1970.

The data, views, or arguments presented with respect to the proposed Rule will be available for examination by interested parties at the office of the Assistant Secretary for Legal and Public Records, Federal Trade Commission, Washington, D.C., and will be considered by the Commission in the establishment of a Trade Regulation Rule.

All interested persons, including the consuming public, are urged to express their approval or disapproval of the proposed Rule, or to recommend revisions thereof, and to give a full statement of their views in connection there-with.

Issued: August 8, 1970.

By the Commission.

[SEAL] JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 70-10357; Filed, Aug. 7, 1970; 8:47 a.m.]

NOMINATION — 1970

HEARING
BEFORE THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

NOMINATION OF

MILES W. KIRKPATRICK TO BE CHAIRMAN OF THE
FEDERAL TRADE COMMISSION

August 20, 1970

Serial No. 91-88

* * *

Senator MOSS. You are aware of course that consumers are showing an increased interest and in fact demanding their rights to participate in the regulatory process by which we are supposed to protect the environment and the quality of the marketplace and the old rules appear to no longer be in effect. We are concerned that the FTC as the major agency of consumer protection at the Federal level be fully responsive to the burgeoning insistence that the marketplace be improved. In that connection do you believe the FTC rules of practice should be amended to assure interested parties the right to participate in FTC proceedings?

Mr. KIRKPATRICK. I assume without knowing the answer that we already have procedures which permit intervention of interested parties. And I assume also the procedures

would permit the appearance, the filing of briefs and the like. This is a complicated question with which the Commission has dealt in some detail in recent cases. I am not familiar with the detail of the matters and really cannot comment further than that at this time.

Senator MOSS. The designation of the Bureau of Deceptive Practices has been changed to the Bureau of Consumer Protection. Other than the establishment of a Consumer Advisory Board and consumer protection committees in the field and the creation of a Consumer Education Office, what new steps have been taken in consumer protection?

Mr. KIRKPATRICK. We have, as I understand it, a few groups of consumer representatives, I don't know that that is the exact title, that have been coming from the field offices, who have been taking training, if you like, and then going back to the field offices. That has been done, sir.

I think these consumer advisory and consumer protection committees are a great step forward. I think they will be the eyes and ears of the Commission in the matter of consumer protection, to develop what must be developed in this field.

May I say there is a great deal of talk and I am aware of that, about consumer protection. But there is to the best of my knowledge very little solid economic learning in this field. I would hope that these consumer protection agencies in the field and the consumer advisory groups, would develop a body of learning.

May I give you a further example?

I understand that the computerized program that the Commission established in Chicago has developed this interesting fact, that the most frequent complaint that has come to that consumer protection group, is the failure to deliver goods upon an order of a consumer. That is a surprising fact. I would not have expected that. But that is the kind of thing I

hope we develop, the kind of information, which is very important in this field.

Senator MOSS. Do you intend to make increased use of public hearings and trade regulation rules?

Mr. KIRKPATRICK. We intend to—it would certainly be my intention to do so.

Senator MOSS. We covered that part earlier.

Senator MOSS. Thank you very much, Mr. Kirkpatrick. I appreciate your answers.

As you can see, we have many things about which we have great concern, and on which we must turn to the Trade Commission for effective enforcement. We are anxious that you vigorously pursue these consumer areas that we have been talking about in this series of questions.

Thank you very much.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. KIRKPATRICK, I have just one other question that was brought up on the cigarette bill. There is a new proposed rule of the Trade Commission to require tar and nicotine listing in the advertising of cigarettes. As you know, we have been working with the tobacco industry for a long time, and I must say there has been good cooperation with the industry, seeking a voluntary agreement by them to do just what the Trade Commission is suggesting in the proposed rulemaking.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. I wanted to ask you if this can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?

Mr. KIRKPATRICK. In my judgment; yes, sir.

The CHAIRMAN. I hope that that can be pursued, because I must say they have been very cooperative and I think we might work out something along that line. We did that a long time ago in advertising with the hard liquor people. And for years it has been just an agreement between us and them that they don't go on television. And it has worked. And we have a sort of a loose agreement with the beer people that they don't drink beer on television.

Now if you stopped a man on the street and said, "Do you know that people don't drink beer on television?" He would say, "What do you mean? I just saw them drinking beer last night."

Mr. KIRKPATRICK. That is my impression.

The CHAIRMAN. Because the advertising gets right up to it. But it seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.

Mr. KIRKPATRICK. It would be a highly desirable arrangement, sir; indeed, yes.

The CHAIRMAN. All right.

Senator HART

Senator HART: I will yield to the Senator from Kentucky.

Senator COOK. May I say to the Senator and the chairman, after Senator Moss and the chairman get through with tobacco and whisky, there is not much left of the Commonwealth of Kentucky.

The CHAIRMAN. Well, there are a few things left, but we won't mention them today.

Senator COOK. For Senator Magnuson's benefit, we are getting a group of people to be anti-SST in the Commonwealth of Kentucky.

Mr. Kirkpatrick, to be serious, I would hope from the start of questioning that your nomination wouldn't depend on your overall enthusiasm of S. 3201. As you well know I have strong objections to this bill and purely and simply because I believe that the Congress is about to extend to the Federal Trade Commission authority that it has to and should reserve to itself.

Let me ask you this: I was delighted to hear you say if the adjudicatory authority of the Commission were not in existence, probably you would not be sitting here. I think this is fine. But you do agree there is a limit beyond which the adjudicatory authority of an agency should go before the Federal court system assumes its responsibility; do you not?

Mr. KIRKPATRICK. Well, there must be some limit, sir, yes. Exactly what you have in mind, of course I don't know. I don't mean to fence with you, but, yes.

Senator COOK. What I have in mind is at least my own legal interpretation of rule 23 of the Rules of Civil Procedure, in relation to S. 3201 and the authority that is to be vested in the Federal Trade Commission by this bill. And I merely had this in mind. I hope I will be able to expound on it at a later time.

The CHAIRMAN. Would the Senator yield a moment there? I must be excused, and I think Senator Cotton has to leave too.

Senator COTTON. Before leaving, I will say I didn't go into these matters, because I knew Senator Cook was going into them. However, I am very much interested in the questions I anticipate he will ask.

Senator COOK. I wonder whether you have read to any great extent section 201, subsection 1(p) of the present proposed act?

Mr. KIRKPATRICK. I have not studied it, I am aware of it.

Senator COOK. As a matter of fact, in light of the criticisms that have been leveled against the FTC and as a matter of fact some of which are contained in your report, don't you think Congress should retain the power to define those unfair acts which may become a legal cause of action in a Federal district court? Or do you think that broad, all-expansive power should be delegated to the Federal Trade Commission?

Mr. KIRKPATRICK. I think in fairness, Senator, I have not come to grips with that in any way that permits me to give you an answer which is categorical. I do, however, appreciate the force of that which you are saying, and the force of your statement in the report and, indeed, it disturbs me.

On the other hand, I have not had the benefit of any thinking on the matter, any conferring with my colleagues or others. I would prefer to simply leave it that I recognize very much of the force of your remarks but I have not myself made up fully my mind.

Senator COOK. There is another question I have to ask you and I am sure your answer will be satisfactory in the record, but I hope that in this business of cigarette advertising, that you would not have any preconceived ideas or that you would not have any strong objectivity in regard to the attitude of some of the members of this committee.

Let me tell you why. During our discussions relative to the act that was passed in the spring, we had a hearing with the radio and television people and it was their desire, and I am sure this is public knowledge, it was their desire that they wished to be phased out in 3 years. It was the desire of this Senator that the advertising go off last September. It was their desire that they be phased out in 3 years because this represented 12½ to 14 percent of their entire income and they could not sustain such a loss.

I might even say to you part of the argument that made up the decision to go until after the bowl games of January 1

of next year, for their benefit, by many of the people on the committee who were

* * *

Federal Trade Commission

NEWS

WASHINGTON, D.C. 20580

For further information call:
David H. Boswell
Office of Public Information
(202) 962-7144

FOR RELEASE After 8:30 A.M., Thursday, October 1, 1970

FTC DIRECTS TOBACCO INDUSTRY TO SUBMIT SPECIFICS ON DISCLOSING TAR AND NICOTINE CONTENT

The Federal Trade Commission has given cigarette manufacturers 30 days in which to tell the Commission exactly how they voluntarily intend to disclose tar and nicotine content in cigarette advertising. The FTC also postponed the October 15 hearings on its proposed trade regulation rule to require such disclosure.

The Commission, after considering the tobacco industry's plan, will set a new hearing date if it still feels a trade regulation rule would be in the public interest.

FTC Chairman Miles W. Kirkpatrick said: "The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

The written submissions by the industry will be placed on the public record for 30 days for public comment.

FEDERAL TRADE COMMISSION
NEWS

For further information call:
David R. Buswell
Office of Public Information
(202) 962-714

FOR RELEASE Immediate Wednesday, December 23, 1970

FTC SUSPENDS PROCEEDING TO REQUIRE DISCLOSURE OF TAR AND NICOTINE CONTENT IN CIGARETTE ADVERTISING AFTER INDUSTRY AMENDS VOLUNTARY PLAN

On October 23, 1970, eight major members of the tobacco Industry submitted to the Commission a voluntary plan for the disclosure of tar and nicotine content in cigarette advertising. The Commission announced its receipt of the voluntary plan, placed it on the public record, postponed the scheduled public hearing on a proposed trade regulation rule covering the same subject and published notice of the foregoing in the Federal Register. Fifteen comments were received from the public.

Following discussions between representatives of the industry and the Commission's General Counsel, the voluntary plan was amended by the industry members in several respects favorable to the public interest.

After considering the public comments and the tobacco industry's amended plan, the Commission has determined to suspend indefinitely the proceeding for a trade regulation rule covering disclosure of tar and nicotine content in cigarette advertising. It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan which it has proposed. In taking this action the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this sub-

ject at any time it deems such action to be necessary or desirable in the public interest.

The Commission believes that if the amended plan operates satisfactorily, the public will, at the earliest possible time, be informed of the tar and nicotine content of cigarettes. In addition, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Nov. 9, 1970

FEDERAL TRADE COMMISSION
RECEIVED
NOV 12 1970
SECRETARY

TO : Commission.

FROM : Allen F. Brauninger, Attorney,
Division of Food & Drug Advertising,
Bureau of Consumer Protection.

SUBJECT: Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising—Rejection Recommended.

Pursuant to the Commission "minute" dated October 27, 1970, the staff has examined carefully the proposal to disclose tar and nicotine content in cigarette advertising on a voluntary basis, and the memorandum supporting the proposal, submitted jointly by eight cigarette manufacturers on October 23, 1970. The staff recognizes the desirability of settling this matter in a voluntary fashion, if such settlement will protect the public interest involved in the matter. It is the opinion of the staff that this proposal is not adequate to protect the interests of cigarette consumers and the general public because:

(1) It fails to include point-of-sale display materials in the advertising covered by the proposal.

(2) It allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers.

(3) It contains a format for disclosing tar and nicotine content which would not convey clearly to the general public the date of the Commission test results to which reference is made.

(4) It lacks any enforcement mechanism.

Before discussing each of these deficiencies in detail, it should be noted that by "minute" dated September 16, 1970, the Commission directed the General Counsel, the Acting Assistant Director for Food & Drug Advertising, and the undersigned to meet with representatives of the Tobacco Institute, Inc. to explore the possibility of reaching an agreement with all cigarette manufacturers to disclose tar and nicotine content voluntarily in cigarette advertising. During the meetings which occurred pursuant to this "minute," representatives of the Tobacco Institute offered proposals generally similar to the one now presented to the Commission. At that time the Commission staff pointed out to the Tobacco Institute representatives objections of the same kind which will be discussed below. Therefore, it cannot be supposed that the deficiencies in the industry submission to the Commission are the result of inadvertent omissions, or that representatives of the cigarette industry have not had opportunity to consider the staff's objections.

1. Failure to Include Point-of-Sale Materials in Advertising Covered by the Proposal. The principal purpose of the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in all cigarette advertising is to provide cigarette smokers with reliable information about the quantity of tar and nicotine produced by the smoke of the many varieties of cigarettes advertised in this country. The staff believes that this information is needed by cigarette smokers to prevent deception and to provide the basis for a more rational choice among the competing varieties. Point-of-sale materials (such as posters, counter displays, and calendars) are designed to catch the customer's eye and deliver a last-minute appeal to purchase the featured variety. The staff believes

that these materials should disclose the tar and nicotine content of the featured variety because they are highly visible to cigarette smokers and are placed at the ideal location to influence choice among competing varieties.

At the risk of laboring an obvious point, the text of the proposed Trade Regulation Rule requires disclosure of tar and nicotine content Regulation "in all advertising"; the proposal offered by the cigarette manufacturers "in lieu of any formal Trade Regulation Rule proceeding" would disclose tar and nicotine content in "some" advertising.

The industry claims that point-of-sale materials are too inflexible and too trivial to be subject to the requirement that tar and nicotine content be disclosed. We disagree; we believe that it would be clearly in the public interest for all such material to disclose the most recent tar and nicotine figures with an indication of the date of such test.

Reports have been circulated in the advertising trade that after the ban of cigarette advertising from broadcasting media takes effect on January 2, 1971, the cigarette industry can be expected to place much greater emphasis on point-of-sale promotional materials than in the past. Only the manufacturers know definitely if this will be the case. In any event, the program submitted by the manufacturers leaves a "loophole" available for such emphasis in the future.

2. Use of Tar and Nicotine Data From Laboratories Iterated by the Manufacturers. The proposal submitted by the cigarette manufacturers would allow the manufacturers to use in advertising tar and nicotine data derived from tests conducted by the manufacturers' own laboratories, utilizing the testing methodology adopted by the Commission, in three instances:

a. When a manufacturer introduces a new variety onto the market, the manufacturer would be allowed to use tar and nicotine data derived from its own laboratory tests until that

variety was sampled, tested and included in the Commission's published test report of tar and nicotine.

b. If the Commission fails to include any variety in its published report of tar and nicotine content, the manufacturer would be allowed to use tar and nicotine data derived from its own tests until the Commission's published report includes that variety.

c. If a manufacturer determines that tar or nicotine content of any of its varieties differs more than twenty percent from the figures in the most recently published Commission report, submits samples of that variety for retesting by the Commission laboratory, and is not given the results of retesting by the Commission laboratory within thirty working days, the manufacturer would be allowed to use the data obtained from its own laboratory testing until the Commission laboratory made available to the manufacturer the results of its retesting.

Although the industry proposal specifies that the manufacturers' laboratories will use the methodology adopted by the Commission to determine tar and nicotine content, this methodology requires the use of sensitive instruments by skilled laboratory technicians who must make many careful measurements and several complex mathematical calculations to determine the tar and nicotine content of any given variety. The staff believes that those provisions in the manufacturers' proposal which would allow cigarette companies to use tar and nicotine data developed in their own testing laboratories are undesirable as a practical matter because the Commission has no evidence about the reliability of the testing laboratories of the various cigarette manufacturers. Additionally, those provisions which would allow use of the manufacturers' own tar and nicotine data in cigarette advertising, if accepted, would provide fuel to the argument advanced by some of the more vociferous critics of the Commission that the agency has an unhealthy familiarity with the industries that it is supposed to regulate. Regardless of the

merit of such arguments, the appearance of associations which give rise to such criticism should, in the staff's opinion, be studiously avoided.

During the meetings with representatives of the Tobacco Institute, the problem of new varieties was discussed extensively. The staff fully appreciates the industry's understandable desire to prevent disclosure of information about the identity of the manufacturer, brand name, physical characteristics, packaging, tar or nicotine content, or marketing plans for new varieties until such varieties are placed on the market. The staff believes that the Commission's laboratory should test any new variety before it is advertised. The staff advised the Tobacco Institute representatives that such testing by the Commission laboratory could be done in such fashion as to prevent unauthorized disclosure of any information about the manufacturer's identity, brand name, physical characteristics, etc., before the new variety is introduced onto the market.

The staff believes that if a manufacturer desired to advertise a new variety, the Commission laboratory could test samples of that variety, unidentified by trade name, supplied by the manufacturer from the production line, and inform the manufacturer of the tar and nicotine content. At the time the manufacturer desired to advertise that variety, the manufacturer could inform the Commission staff of the brand name to be assigned to the new variety and the Commission laboratory could publish the results of its testing as a supplement to its most recent report.

Essentially the same procedure could be followed if a variety were inadvertently overlooked in the regular market sampling and testing.

The staff recognizes that manufacturers can change the formulation and design of their varieties to alter tar and nicotine content. The staff also recognizes the desirability of encouraging manufacturers to market cigarettes with lower tar

and nicotine content. The manufacturers' proposal is drafted to allow manufacturers to submit samples of any variety for retesting when "any company determines that the 'tar' or nicotine values of any of its varieties have become larger or smaller than twenty percent of the most recently published Commission results." As stated earlier, under the terms of the manufacturers' proposal, if the Commission laboratory did not retest the varieties and give the manufacturer the results within thirty working days after receiving samples for retesting, the manufacturer would be allowed to use tar and nicotine data developed in its own laboratory until the Commission laboratory furnished its results to the manufacturer.

The staff believes that this proposal would allow manufacturers to flood the Commission laboratory with requests for retesting. The industry proposal does not require a manufacturer to state the way in which it determined that the tar or nicotine content of the variety in question is at variance with the figures listed in the Commission's report. A second apparent flaw with this part of the manufacturers' proposal is that, if retesting did establish that the tar or nicotine content of the variety in question had in fact been changed, no obligation is imposed on the manufacturer to withdraw all packages of the previous version of the reformulated variety from the market, or to alter the packaging of the reformulated variety so that consumers could distinguish the new version from the old.

The staff believes that, if a manufacturer reformulated a variety and packaged the new version so that it could be distinguished from the old, and informed the staff of this fact, adequate arrangements could be made to prevent intermixing samples of the two versions collected during the normal sampling procedure. The two versions could then be tested and reported separately during the regular testing cycle.

To summarize, the staff believes that for both practical and policy considerations, it would be highly undesirable to allow cigarette manufacturers to use tar and nicotine data in

advertising obtained from the manufacturers' own laboratories. The staff believes that the three problem areas discussed above can be resolved fairly to the manufacturers and to the public interest without accepting a proposal which would allow cigarette manufacturers to use tar and nicotine data developed in their own laboratories.

3. Format for Disclosing Tar and Nicotine Content. It is well known that the production and publication of any advertisement necessarily involves problems of scheduling and deadlines. Some media are more flexible than others, but at some point in the preparation of any advertisement, the text of the advertisement must be submitted in its final form and cannot thereafter be changed. It is also well known that some media, such as daily newspapers, require advertising copy in final form only a few days before publication; others, such as monthly magazines, require copy in final form several months before the periodical reaches subscribers and news stands. During the discussions in September, both the staff and the representatives of the Tobacco Institute devoted considerable attention to the problem "lead" time for advertising copy. All parties to the discussions could see that, in cases involving media with deadlines far in advance of distribution, an advertisement could be prepared with tar and nicotine data from the "most recently published Federal Trade Commission report," and submitted to a publisher to meet the established deadline for advertising copy, and that, in the interval between the publisher's deadline and the date of distribution, the Commission might release a new report of tar and nicotine content of cigarettes. To meet this problem, the staff suggested that the format for disclosing tar and nicotine indicate the date of the Commission report from which the tar and nicotine data was taken, as in the following example:

_____ mg. "tar," _____ mg. nicotine per cigarette.

Source: FTC Report of May 18, 1970.

The industry proposal would assign a number to each Commission report on tar and nicotine content of cigarettes[1/]), and would identify the report from which the tar and nicotine data used in any cigarette advertisement in the following manner:

_____ mg. "tar," _____ mg nicotine
av. per cigarette, FTC Report _____.

The staff believes that the industry's proposed format is unacceptable because it adds the unnecessary element of assigning a number to reports which would be more easily and meaningfully identifiable by the date of publication in the Federal Register. (Publication of the reports in the Federal Register is a change to existing practice proposed by the manufacturers to which the staff makes no objection.) The staff believes that reference to a report number in the disclosure of tar and nicotine content would only serve to conceal the date of the Commission report and create confusion in the minds of the general public. (It is noted in passing that the industry desires to insert the abbreviation "av." for "average" into the disclosure format. The staff believes that the disclosure format would be better without the use of "av." However, the tar and nicotine values obtained by the Commission testing procedure are in fact averages, and for that reason the staff has no strong objection to the inclusion of the abbreviation "av." in the disclosure.)

4. Lack of an Enforcement Mechanism. When the Commission staff first met with representatives of the Tobacco Institute, the staff expressed the view that one essential element of any voluntary scheme for disclosure of tar and nicotine content in cigarette advertising would be an effective

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1/ See page 3 of industry's "Explanatory Memorandum Relating to Voluntary Program for 'tar' and Nicotine Disclosure," dated October 23, 1970, attached.

and efficient enforcement mechanism. To give a concrete illustration of the mechanism envisioned, the staff drafted and presented to the Tobacco Institute representatives a proposed complaint and consent order in which each cigarette manufacturer would agree to cease and desist from failing to disclose in all advertising the tar and nicotine content of the advertised variety or varieties based on the most recently published Commission test results. The Tobacco Institute representatives told the staff that such a consent order mechanism was completely unacceptable to their member companies. The staff then suggested that they propose an alternative mechanism which would insure compliance with their voluntary disclosure proposal. The submission from the cigarette manufacturers dated October 23, 1970, contains no enforcement mechanism. If the Commission were to accept this proposal, and if at some time in the future one or more participating cigarette manufacturers determined that it would be advantageous to cease disclosure of tar and nicotine content in cigarette advertising, the Commission would be in no better legal position to compel disclosure than it is at this time. The staff believes that the past record of cigarette manufacturers in matters related to false and misleading advertising makes reliance on their good faith alone for any program of voluntary compliance highly inadvisable.

Although this proposal has no specific provision to insure the participating manufacturers' compliance, the accompanying memorandum has a clearly written escape clause which would allow the manufacturers to withdraw from their agreement if the Commission fails to "conduct and publish new test results at least six months after an earlier test has been published . . . ." While the staff anticipates that the Cigarette testing laboratory would have no difficulty under normal operating conditions in conducting and publishing the results of at least one test for tar and nicotine content every six months, the terms of the manufacturers' accompanying memorandum make no provision for accidents, illness or dis-

asters which might interfere with the mechanics of the testing program and the subsequent publication of test results. As the Commission knows, the testing machine is a delicate, expensive piece of equipment requiring periodic maintenance; a minor breakdown which delayed testing results for only a few days could result in the invocation of the escape clause by the industry. The staff believes that provisions such as this escape clause reveal much about the attitude of the industry in submitting its proposal.

Conclusion and Recommendations. For the reasons set forth above the staff strenuously urges the Commission to reject the industry's proposal in its entirety. The staff believes that further discussions with representatives of the Tobacco Institute are most unlikely to be fruitful, and for that reason recommends that the Commission reschedule the hearing on the proposed Trade Regulation Rule to require disclosure of tar and nicotine content in cigarette advertising. Attached is a list of persons and groups who have expressed interest in presenting testimony on the proposed Rule.

It is noted that the Commission news release dated October 1, 1970, relating to the Commission action which invited representatives of the cigarette manufacturers to submit their proposal to disclose tar and nicotine content in cigarette advertising, contains the statement: "The written submissions by the industry will be laced on the public record for 30 days for public comment." The cut-off date for public comment on the industry proposal has been set for December 1, 1970. The staff expects to devote most of its time during the months of November and December to the preparation of the Report to Congress on Cigarette Advertising and Labeling, which the Commission is required to submit not later than January 1, 1971, by provisions of the Public Health Cigarette Smoking Act.

If the Commission accepts the staff recommendation to reject the industry proposal and reschedule the hearing on the

proposed Trade Regulation Rule, the staff further recommends that a date for the hearing be set in January of 1971.

Respectfully submitted,
/s/
Allen F. Brauninger,
Attorney,

APPROVED:

/s/
Gerald J. Thain,
Acting Assistant Director for Food & Drug Advertising.

/s/
Paul A. Jamarik,
Acting Director,
Bureau of Consumer Protection.

cc: General Counsel, and,
Acting Assistant Director for Scientific Opinions.

Attachments include Statement of the Surgeon General, U.S. Public Health Service on Proposed FTC Rule.

CP: AFBrauninger:rlc

UNITED STATES GOVERNMENT

MEMORANDUM

Date: November 24, 1970

TO : Commission

FROM : Miles W, Kirkpatrick, Chairman

SUBJECT: Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising

The staff recommends rejection of the tobacco industry's proposal for voluntary disclosure of tar and nicotine content in cigarette advertising. This recommendation is based on four objections to the industry proposal. First, it fails to include point-on-sale display materials in the advertising covered by the proposal. Secondly, it allows in some instances the use of tar and nicotine data from laboratories operated by the manufacturers. Thirdly, it contains a format for disclosing tar and nicotine content which would not convey clearly to the general public the date of the Commission test results to which reference is made. Finally, it lacks any enforcement mechanism.

Since the cut-off date for public comment on the industry proposal has been set for December 1, 1970, it will be appropriate to begin discussion of our course of action at our next meeting, and I invite the staff to attend this discussion.

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Dec 21 1970

TO : Commission.

FROM : Allen F. Brauninger, Attorney
Division of Food & Drug Advertising,
Bureau of Consumer Protection.

SUBJECT: Modification of Industry Proposal for Disclosure of Tar and Nicotine Content in Cigarette Advertising—Implementation Recommended.

By memorandum dated November 9, 1970, the undersigned outlined objections to a proposal to disclose tar and nicotine content on a voluntary basis submitted on October 23, 1970, by eight cigarette manufacturers as an alternative to the Commission's proposed rule-making activity. The principal objections to the industry proposal discussed in the previous memorandum were:

(1) Failure to include point-of-sale display materials;

(2) Use of tar and nicotine data from laboratories operated by manufacturers;

(3) Reference to Commission test reports by number instead of by date when disclosing tar and nicotine; and

(4) Lack of an enforcement mechanism.

On December 18, 1970, the eight manufacturers who had proposed voluntary disclosure of tar and nicotine content in cigarette advertising submitted a modification of their original plan and requested reconsideration by the Commission.

The modified proposal adds to the description of advertising in which tar and nicotine content would be disclosed

"all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period." The staff believes that the amended language covers the large majority of point-of-sale materials. The staff realizes that a number of such materials would still fall outside the advertising subject to tar and nicotine disclosure; including such items as metal or plastic signs, window decals, clocks, calendars, thermometers, and metal or plastic stands to display cigarette packages. It is believed that these are relatively minor items and that the important point-of-sale materials, such as the counter display cards currently being used in connection with specific advertising campaigns for various brands of cigarettes, are now included in the industry plan.

The modification concerning coverage also deletes the word "paid" from the definition of billboards–subject to the proposal. This change clarifies any ambiguity about the status of signs to promote the sale of cigarettes which appear on buildings, vehicles or other property owned by cigarette manufacturers.

In the previous memorandum, the staff discussed at length the problems presented by that portion of the industry proposal which would have allowed industry members to request retesting when "any company determines that the tar or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test results." The modification to the industry proposal requires that any manufacturer who desires a retest must support his request with laboratory test results. The modification further provides that a market sample for retesting must be collected by Western Union in accordance with the Commission's sampling procedures, at the expense of the manufacturer who desires retesting; allows the Commission 45 working days (nine weeks) in which to conduct the retest; and specifies that in the event the Com-

mission cannot complete the retest within 45 working days, results from the Tobacco Institute Testing Laboratory (not the manufacturer's laboratory) may be used in advertising. The staff believes that these additional provisions should be adequate to prevent any flood of spurious requests for retesting, which was a matter of concern under the earlier proposals submitted by the industry.

The industry proposal still allows use of test data obtained from laboratories operated by the manufacturers in advertising for any variety which is not included on the Commission's published test report—either because the variety was not marketed until after the last test was completed, or because the variety was inadvertently omitted by the Commission laboratory. While it would be desirable for the Commission laboratory to test new varieties before introductory advertising is begun, the staff believes that if a manufacturer deliberately misrepresented tar or nicotine content of a new variety, subsequent market sampling and testing could give grounds for issuance of a complaint, possibly including an order to require disclosure of previous false advertising in appropriate cases.

The previous memorandum also discussed the problems presented in the industry's original proposal to identify FTC test reports by number rather than by date when disclosing tar and nicotine content. The modified proposal requires identification of test reports by the month and year of publication, thus solving this problem.

The modification also provides that the plan shall take effect within 30 working days (six weeks) after the Commission gives notice to the industry that it favors implementation of the manufacturers' proposal.

The modification makes no provision for any enforcement mechanism. The Division of Food & Drug Advertising has previously indicated the dangers inherent in allowing this industry to proceed under self-regulation. However, if the

Commission is willing to forego the requirement of an enforcement mechanism, the staff believes that the modified industry proposal is the best attainable alternative to further proceedings on the proposed Trade Regulation Rule.

The staff has read the memorandum dated December 14, 1970, which the General Counsel submitted on the modification to the industry plan, and concurs with the analysis and recommendations contained in that memorandum.

Respectfully submitted,
/s/
Allen F. Brauninger,
Attorney.

APPROVED:

/s/
Gerald J. Thain,
Acting Assistant Director
for Food & Drug Advertising.

/s/
Robert Pitofsky,
Director,
Bureau of Consumer Protection.

cc: General Counsel
Acting Assistant Director
for Scientific Opinions.

CP: AFBrauninger:rlc

THE TOBACCO INSTITUTE, INC.

1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

December 17, 1970

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter, which constitutes a revision of the letter and memorandum forwarded to the Commission on October 23, 1970, signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., Trading as The House of Edgeworth; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any

public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

I understand that Liggett & Myers Incorporated is writing a separate letter to the Commission explaining the basis upon which it is a signatory to the voluntary proposal submitted.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, in advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States, and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commis-

sion, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in those issues of newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which is reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report (date).

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the adver-

tised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines from test data that the "tar" or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain

from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within forty-five working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED

By /s/ _____
Milton E. Harrington,
President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/ _____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/ _____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/ _____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS

By /s/ _____
Constantino Stephano

UNITED STATES TOBACCO COMPANY

By /s/ _____
L.A. Bantle, President

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of December 17, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals; as well as advertising on billboards, on handbills, and in direct mail circulars; and on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Media billboard advertising messages on the following structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer

in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each or twenty ports.

In the first legend, relating to a Commission market pick-up, the FTC Report, from which the "tar" and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately 4-6 months. Obviously if the Commission should, for some reason, totally discontinue its testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. During the period until more current test results are available, the company will utilize the latest published Commission test results.

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 22, for example, then

"tar" and nicotine data will be included in all advertising placed more than thirty working days after December 22 in accordance with this program.

POINT 1: Correct language at bottom of page 1 of letter.

THE LETTER:

In the last line of page 1 of the letter, insert the words "those issues of" before "newspapers."

THE MEMORANDUM:

No revision necessary in memorandum.

POINT 2: Employ the date of the Commission test results in the legend.

THE LETTER:

In the letter, revise the last line of the legend in the middle of page 2 to state "av. per cigarette, FTC Report (date)".

THE MEMORANDUM:

In the memorandum, eliminate the last paragraph on page 3 and replace it with the following: "In the first legend, relating to a Commission market pick-up, the FTC Report, from which the 'tar' and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71".

POINT 3: The objection to the term "paid" in the definition of billboards in the memorandum.

THE LETTER:

No revision is necessary in the letter.

THE MEMORANDUM:

Delete the word "paid" each of the two times it appears in the definition of billboards at the bottom of page 1 and the top of page 2. Add the following language on the top of page 2 immediately following "transportation terminals": "A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program."

POINT 4: The Commencement Date.

THE LETTER:

In the last paragraph of page 3 of the letter, strike the words "as soon as practicable" and replace them with "30 working days."

THE MEMORANDUM:

In the memorandum, add a new paragraph at the end of the memorandum on page 5 as follows:

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 20, for example, then "tar" and nicotine data will be included in all advertising placed more than thirty working days after December 20 in accordance with this program.

POINT 5: The Procedures in case of a 20% change.

THE LETTER:

Strike entirely paragraph 2, page 3. Replace it with the following:

"In the event that any company determines from test data that the 'tar' or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain from Western Union a similar market pick-up of the variety. If within 45 working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within 45 working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it."

THE MEMORANDUM:

Correct the paragraph of the memorandum on page 5 relating to changes in "tar" and nicotine in the following manner.

Eliminate the last two sentences beginning "Under this procedure" and replace them with the following:

"During the period until more current test results are available, the company will utilize the latest published Commission test results."

POINT 6: Point of Sale.

THE LETTER:

Page 1, paragraph 2, replace the first "and" in the third line from the bottom of the paragraph with the word "in."

In the last line of paragraph 2, page 1, after "the United States" add, ", and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period."

On page 2 of the letter in the paragraph which is carried over from page 1, delete "and" before "(c)" and add at the end of the paragraph, "; (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register."

THE MEMORANDUM:

In the memorandum, add at the end of the third line of the section entitled "Advertising Covered" "and on signs displayed inside of

stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period."

THE TOBACCO INSTITUTE, INC.
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-9434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

OCTOBER 23, 1970

Federal Trade Commission
Washington, D.C. 20680

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., trading as The House of Edgeworth; Liggett & Myers Incorporated, Cigarette and Tobacco Division; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that, "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any

public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

October 23, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade Commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, and advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all ad-

vertising in newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report _____.

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines that the "tar" or nicotine values of any of its varieties have become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company will submit that variety of cigarettes to the Commission for testing. If within thirty working days the Commission supplies that company with its test determinations, the company will thereafter utilize those results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within thirty working days, then the company will utilize, in accordance with this program, its own test results until such time as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin as soon as practicable after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED CIGARETTE AND TOBACCO DIVISION

By /s/_____
Kenneth McAllister,
President

LORILLARD, a Division of Loew's Theatres, Inc.

By /s/_____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/_____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/_____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS
By /s/_____
Constantino Stephano

UNITED STATES TOBACCO COMPANY
By /s/_____

October 23, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of October 23, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals, as well as advertising on billboards, on handbills and in direct mail circulars. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Paid media billboard advertising messages on the structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Paid advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the

Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each of twenty ports.

In the first legend, relating to a Commission market pickup, FTC reports identified by number are employed rather than dates because the existence of a date would be more confusing to consumers than merely report numbers. This is particularly true because the only value of a date or report number is to permit consumers to distinguish between different sets of figures in terms of which published result is more recent. This distinction can be more easily made on the basis of report numbers. In view of the previous FTC testing, it is recommended that the report numbers to be covered by this program might begin with No. 10.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately 4-6 months. Obviously if the Commission should, for some reason, totally discontinue its

testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not

require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. Under this procedure each company will submit cigarettes of the variety which has changed in "tar" or nicotine content to the Commission for its testing, and if that is not feasible, the company will disclose "tar" and nicotine on the basis of its own testing in accordance with the Commission methodology until the next Federal Register publication. During the period in which cigarettes have been submitted to the Commission, the company will utilize the latest published Commission test results.

RECEIVED
DEC 28 1970
LEGAL RECORDS

FOR CONFIDENTIAL STAFF USE ONLY

December 22, 1970

Memorandum for General Counsel,
Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

File 682 3093—Cigarette Testing
In re: Proposed Methodology for Determination of Tar and Nicotine Content

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Reference is made to memorandum of December 14, 1970 from the General Counsel reporting pursuant to the action of December 3, 1970.

The Commission took the following action:

In re: (1) Voluntary Plan by The Tobacco Industry for Disclosure of Tar and Nicotine Content in Cigarette Advertising;
(2) Trade Regulation Rule Proceeding Requiring Disclosure of Tar and Nicotine Content in Cigarette Advertising.

The Commission determined to suspend indefinitely the proceeding for a trade regulation rule covering disclosure of tar and nicotine content in cigarette advertising, which proceeding was authorized by action of August 4, 1970, and to afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan which it has proposed.

In taking the above action, the Commission is retaining the unconditional right to reschedule the trade regulation rule

proceedings and to take any other action relating to this subject at any time it deems such action to be necessary or desirable in the public interest.

The Commission approved the "Statement of The Commission" to the above effect, as amended at the table and noted on the marked copy; and directed that a notice of suspension of the Trade Regulation Rule be placed in the Federal Register, and that a news release incorporating the "Statement of the Commission" be issued.

For the public record, the five Commissioners voted in the affirmative as to the foregoing action.

By direction of the Commission.

The papers are transmitted to the General Counsel.

/s/
Joseph W. Shea,
Secretary.

bw

THE TOBACCO INSTITUTE, INC.

1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20005

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

September 11, 1970

Honorable Miles W. Kirkpatrick
Chairman Designate
Federal Trade Commission
Washington, D. C.

Dear Mr. Kirkpatrick:

We are addressing you on behalf of the Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers, Inc., Lorillard, a Division of Loew's Theatres, Inc., Philip Morris Incorporated, R. J. Reynolds Tobacco Company, and United States Tobacco Company. These seven cigarette manufacturers include all but two of the domestic producers of cigarettes. Of these two, we understand that one is prepared to address you promptly on the subject of this letter, and that is the case of the other, which conducts a very minor amount of cigarette advertising, a separate letter will shortly be forthcoming.

With respect to the Commission's recently proposed trade regulation rule regarding disclosure of "tar" and nicotine content in cigarette advertising, we are aware of and in general agreement, as you were, with the views expressed by Senator Magnuson, the Chairman of the Senate Committee on Commerce, during your recent confirmation hearing, to the effect that a voluntary agreement on this matter would be preferable to rule-making, litigation or legislation.

Despite the lack of scientific proof that "tar" and nicotine have any significance in relation to human health, these seven companies have indicated their willingness to explore with the Commission a practicable basis for a voluntary agreement in keeping with practicalities of the market place.

Each of the seven cigarette manufacturers on whose behalf this letter is written has indicated its willingness to include an appropriate reference in advertising to the "tar" and nicotine content of each advertised variety on the basis of the published results of the Commission's cigarette testing laboratory.

Our views as to sample size, methodology employed for testing, and the technique of reporting the Commission's test results are fully recorded at the Commission, and there has been continued cooperation between the Commission and Institute technical staffs.

In our study of this subject, we have encountered several questions which should be resolved in cooperation with the Commission, such as the coverage of non-print, semi-permanent advertisements, the necessity for including in the test results newly developed varieties or varieties not generally available and not presently included in the Commission's testing, the inescapable problem of the lead time required for the placement of periodical advertising, and some procedure for the prompt correction of any calculation errors or inadvertently erroneous test results.

As to each of these, we are prepared promptly to suggest satisfactory solutions which we believe would permit the program to be carried out efficiently and fairly to afford to the public as reliable a disclosure as feasible on the basis of the current sampling and methodology employed by the Commission.

In addition, we are prepared to discuss available methods for insuring compliance with the voluntary program, in the form of individual company assurances of future compliance and

possible expeditious methods for Commission action against any failure to comply, that will additionally serve to insure its effective implementation.

We hope that the Commission can promptly indicate its willingness to explore this voluntary agreement path in lieu of any formal proceedings, and we are prepared immediately to present to the Commission the implementation and lead time refinements involved.

We believe that the Commission will agree that this proposal and its prompt implementation are desirable.

Very truly yours,

/s/ HORACE R. KORNEGAY

Horace R. Kornegay
President

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

September 16, 1970

Mr. Horace R. Kornegay
The Tobacco Institute, Inc.
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Kornegay:

This is in response to your letter of September 11, 1970, addressed to Chairman-designate Kirkpatrick.

The Commission is willing to explore, through The Tobacco Institute, Inc., the possibility of reaching an agreement with all of the cigarette manufacturers on the inclusion of a statement of tar and nicotine contents in cigarette advertising. This position is based, among other things, upon the following:

1. The discussions will take place between designated members of the Commission staff and The Tobacco Institute, Inc., representing certain cigarette manufacturers, with full authority to bind such manufacturers.

2. The discussion shall be conducted on the basis of the terms of the Commission's proposed Trade Regulation Rule, notice of which was issued August 8, 1970, published in the Federal Register, and referred to by you in said letter of September 11, 1970.

3. The Commission will require an expeditious and effective method of insuring compliance with the terms of any agreement.

4. The Commission is unwilling at this time to consider or make commitments with respect to collateral mat-

ters, including presently existing litigation with any cigarette manufacturer.

5. Nothing will be done, at this time, to postpone or cancel the public hearings scheduled for October 15, 1970 on said proposed Trade Regulation Rule.

6. The Commission may terminate these discussions at any time.

The Commission has designated Joseph Martin, Jr., General Counsel, Gerald J. Thain, Assistant Director for Food and Drug Advertising of the Bureau of Consumer Protection, and Allen F. Brauninger, Division of Food and Drug Advertising, to meet with you at your convenience. It should be understood that they have no authority to make commitments which bind the Commission.

By direction of the Commission.

/s/ JOSEPH W. SHEA
Joseph W. Shea
Secretary

FEDERAL TRADE COMMISSION
DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1978 TO DECEMBER 31, 1978

PUBLISHED BY THE COMMISSION

VOLUME 92

* * *

Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved. [*File No. 773 7016, Lorillard, September 26, 1978*]

Advisory Opinion Letter

September 26, 1978

Dear Mr. Gastman:

This is in response to your request for an advisory opinion as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number.

The Commission understands that you request was transmitted orally to a Commission staff attorney. Although requests for advice should be submitted in writing to the Secretary of the Commission, § 1.2 of the Commission's Rules of Practice, the Commission has determined to render an advisory opinion because it has sufficient information regarding the proposed course of action.

Under the agreement submitted to the Commission by Lorillard and seven other cigarette companies, dated December 17, 1970, cigarette advertisements must include tar and nicotine data from Commission test results most recently published in the Federal Register, subject to certain specified exceptions necessary to meet deadlines for submission of advertising copy. Lorillard's proposed advertisements would deviate from this industry agreement, by permitting cigarette advertisements to feature a tar number greater than the latest FTC tar number for an indeterminate length of time.

The Commission cannot give its approval to Lorillard's proposed advertising plan. In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated. At the same time, the Commission could not condone the practice of utilizing a higher headlined tar figure in the voluntary disclosure and labelling the figures "By FTC Method," since the figures would not actually be the result of the FTC method.

Therefore, in the Commission's opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number.

By direction of the Commission.

FEDERAL TRADE COMMISSION DECISIONS

IN THE MATTER OF

AMERICAN BRANDS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8799. Complaint, Sept. 29, 1969 – Decision, Aug. 20, 1971

Consent order requiring a major cigarette manufacturer with headquarters in New York City to cease advertising that its cigarettes are low in tar without clearly disclosing material tar and nicotine content data; tar and nicotine content shall be determined by the testing methods employed by the Federal Trade Commission.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising, sale and distribution

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* Reported as amended by hearing examiner's order of October 24, 1969. Respondent's name was incorrectly stated in the complaint as 'The American Tobacco Company.'

of cigarettes including brands designated 'Pall Mall Gold' 100's, 'Pall Mall Menthol' 100's, and 'Lucky Filters.'

PAR. 3. Respondent transports and causes said cigarettes, when sold, to be transported from its places of business in the State of Virginia, and elsewhere, to purchasers thereof located in various other States of the United States and the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its cigarettes, the respondent has made, and is now making numerous statements and representations in advertising including, but not limited to, advertisements broadcast on radio and television and inserted in magazines, newspapers and other advertising media with respect to the tar content of said cigarettes. Typical and illustrative of said statements and representations, but not all inclusive thereof are the following:

TELEVISION: Good Rich Flavor – Lower in 'Tar'.

RADIO: MAN: Here's good news for particular people * * * people who demand both – good taste and mildness from their cigarette. The newest U.S. Government figures show Pall Mall (Sic) Gold lower in tar than ever before. Lower in tar than the best selling filter king. You make out better at both ends with Big Tip Pall Mall (Sic) Gold. Tastier, Milder, Pall Mall (Sic) Menthol, too.

NEWSPAPERS: And the average puff gives you 26 percent less 'tar' than a non-filter cigarette.

By such statements and others of similar import comprising a comprehensive national advertising campaign and by failing to disclose facts which are material in the light of these statements and which consumers need to make an in-

formed judgment, respondent has represented and created the impression that its cigarettes are low in tar when in truth and in fact its Pall Mall Gold 100's and Lucky Filters contain approximately 20 and 21 milligrams of tar, amounts which rank them 56th and 77th higher among the 122 brands tested than the brand containing the lowest tar level of 4 milligrams.

PAR. 5. By representing its cigarettes as being low in tar when in fact they contain five times the amount of tar found in the lowest yielding brand tested and rank above the midpoint on a tar-yield spectrum running from a low of 4 milligrams to a high of 36 milligrams, respondent has engaged in and practiced falsehood and deception.

PAR. 6. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on September 29, 1969, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion duly certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provisions of Section 2.34(d) of its rules, that the consent order procedure shall not be available after issuance of complaint; and

Respondent and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondent of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondent is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:

1. The 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette; and

2. If the 'tar' content of the advertised brand is compared to that of another brand or brands of cigarette, (a) the 'tar' and nicotine content in milligrams of the smoke produced by that brand or those brands of cigarette, and (b) the 'tar' and nicotine content in milligrams of the lowest yield domestic cigarette: *Provided*, That a comparison to a class of cigarettes, or to many or most of the cigarettes of a class, shall not be deemed a comparison to another brand or brands of cigarette.

II

For the purposes of Paragraph I of this order:

1. The term 'tar' shall mean the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes; and

2. The term 'nicotine' shall mean total alkaloids as nicotine in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1979

* * *

Table 10 shows the percentage of total cigarette advertising expenditures used to promote longer (95-121 mm) cigarettes from 1967 through 1979. Advertising expenditures for these cigarettes remained at the 1978 percentage level, 34%, but the sales data from Table 4, which is repeated in Table 10, reveal that longer cigarettes increased their market share slightly to 32%.

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with FTC "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1976, cigarette manufacturers have greatly increased the aggregate percentage of their advertising expenditures used to promote these cigarettes. The market share of these brands has also increased steadily since 1976. In 1979, cigarette manufacturers spent 66.9% of their advertising budgets to promote cigarettes with 15.0 mg. or less "tar". This represents an 18% increase over the 1978 level. Sales of these cigarettes also increased substantially, from 27.5% of total sales in 1978 to 40.9% in 1979.

For 1979, Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of total advertising expenditures devoted to these cigarettes greatly exceeded their market share. In 1979, cigarette manufacturer's spent an average

of 30.9% of their advertising budgets to promote the sale of cigarettes with 9.0 mg. or less "tar", but these cigarettes accounted for only 10.6% of total sales. Cigarettes falling in what advertisers sometimes call the "ultra low 'tar'" range of 3.0 mg.[8] accounted for less than 3% of total sales and 9.6% of the cigarette advertising expenditures.

Table 12 reports the weighted average "tar" and nicotine emissions of all cigarettes sold domestically, and enables the reader to assign the decline in those values which has taken place since 1968 to one of three factors:

(1) Brand switches among the varieties that had been on the market throughout 1968-1979;

(2) The lowering of the "tar" content of the varieties that had been on the market throughout 1968-1979; and

(3) Brand switches to varieties that were introduced after 1968.

The "A" columns show the weighted average "tar" and nicotine figures for all cigarettes sold in the U.S. from 1968 through 1979. These weighted averages are obtained by multiplying the total yearly sales figure for a given brand by that brand's respective "tar" and nicotine level. The resulting figures for each brand are then added together and divided by the total number of cigarettes sold domestically during the year in question. The "B" columns show these weighted averages only for those cigarette varieties which have been on the market from the year 1968 until the year indicated. Thus, these columns do not reflect the impact of new brands intro-

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[8] The FTC has not defined "ultra-low tar", or any term related to "tar" level except for "low tar", which the FTC defines as 15.0 mg. or less tar. As a result advertisers use a variety of terms to distinguish among "tar" levels.

duced after 1968. Finally, the "C" columns report on the same cigarettes considered in the "B" columns, but assume that the "tar" and nicotine values of these cigarettes had remained constant since 1968. Thus, figures in column "C" provide an indication of what the weighted average would have been if the "tar" and nicotine figures of individual cigarette varieties had not changed since 1968 and if no new varieties had been introduced after 1968.

FEDERAL TRADE COMMISSION

REPORT TO CONGRESS

Pursuant to the
Federal Cigarette Labeling and Advertising Act

For the Year 1980

DATED: November 15, 1982

* * *

Table 11, which has been discussed in the previous section, presents the percentage of total cigarette advertising expenditures used to promote cigarettes with "tar" levels of 15 mg. or less, as well as the sales figures for these cigarettes. Since 1967 the percentage of cigarette advertising expenditures devoted to promoting sales of low "tar" cigarettes has increased dramatically from 5.5% to 65.1%. (The 65.1% figure for 1980 represents a slight decline from the 66.9% spent in 1979.) The market share of these low "tar" brands has increased steadily from 2% in 1967 to 44.8% in 1980. Between 1979 and 1980 there was an increase of nearly 4% in market share.

Table 11 also reports the market share and advertising expenditures for cigarettes with 12, 9, 6, and 3 mg. or less "tar". The percentage of advertising expenditures for cigarettes in each of these categories increased from 1979 to 1980. However, the percentage of advertising expenditures devoted to these cigarettes greatly exceeded their market shares. In 1980, cigarette manufacturers spent an average of 39.7% of their advertising budgets to promote the sale of cigarettes with 9 mg. or less "tar", but these cigarettes accounted for only 16.8% of total sales. Cigarettes in what advertisers sometimes call the "ultra low 'tar'" category of 3

mg. or less[11] accounted for only 3.3% of total sales, but over 15% of cigarette advertising expenditures.

[11] The FTC has not defined "ultra-low 'tar'", or any term related to "tar" level except for "low 'tar'", which the FTC defines as 15.0 mg. or less "tar." As a result advertisers use a variety of terms to distinguish among "tar" levels.

FEDERAL TRADE COMMISSION

[59 Fed. Reg. 51980 (Oct. 13, 1994)]

[File No. 932-3368]

The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a Stamford, Connecticut based company from disseminating ads for Carlton or any other cigarettes that represent that consumers will get less tar or nicotine by smoking any number of cigarettes of any of its brands than by smoking one or more cigarettes of any other brand, unless such representations are both true and substantiated by competent and reliable scientific evidence.

DATES: Comments must be received on or before December 12, 1994.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue NW., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT:
C. Lee Peeler or Shira D. Modell, FTC/601 Bldg. – Rm. 4002, Washington, D.C. 20580. (202) 326-3090 or (202) 326-3116.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following

consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Agreement Containing Consent Order To Cease and Desist

In the matter of: The American Tobacco Company, a corporation.

The Federal Trade Commission having initiated an investigation of certain acts and practices of The American Tobacco Company, a corporation, and it now appearing that The American Tobacco Company, a corporation (hereinafter sometimes referred to as "proposed respondent"), is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between The American Tobacco Company, by its duly authorized officer, and counsel for the Federal Trade Commission that:

1. Proposed respondent The American Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 281 Tresser Boulevard, in the City of Stamford, State of Connecticut.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

a. Any further procedural steps;

b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

d. All claims under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the

proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

[51981]

Order

I

It is ordered that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a nu-

merical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a carton of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this Order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

II

It is further ordered that respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labelling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon component and reliable scientific evidence that substantiates the representation. For purposes of this Order, "component and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has

been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III

It is further ordered that presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate Paragraph I or II of this Order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

IV

It is further ordered that for five (5) years after the last date of dissemination of any representation covered by this Order, respondent or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

V

It is further ordered that respondent shall distribute a copy of this Order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements,

promotional materials, product labels or other such sales materials covered by this Order.

VI

It is further ordered that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this Order.

VII

It is further ordered that respondent shall, within sixty (60) days after service of this Order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from The American Tobacco Company ("American Tobacco').

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns claims made by American Tobacco in its advertising for cigarettes.

The Commission's complaint in this matter charges American Tobacco with engaging in unfair or deceptive prac-

tices in connection with the advertising of its Carlton brand cigarettes. According to the complaint, American Tobacco falsely represented, through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands: (1) That consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tar; and (2) that it had a reasonable basis for claims that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads.

The consent order contains provisions designed to remedy the violations charged and to prevent American Tobacco from engaging in similar deceptive and unfair acts and practices in the future.

[51982]

Part I of the order prohibits American Tobacco from representing, through certain means specified in the order, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar.

Part II of the order prohibits American Tobacco from representing, through those same means, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless, the representation is true and, at the time it makes such claims, American Tobacco has competent and reliable scientific evidence to substantiate the claims.

Part III of the order provides a limited "safe harbor" for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings. Specifically, presentation of the tar and/or nicotine ratings of any of American Tobacco's brands of cigarettes and the tar and/or nicotine ratings of any other brand shall not, in and of itself, be deemed to violate Part I or Part II of the order where no more than a single cigarette or pack or American Tobacco's brand is visually depicted versus a single cigarette or pack of any other brand.

Part IV of the order requires American Tobacco to maintain copies of all materials relied upon in making any representations covered by the order, as well as all materials that contradict or call into question those representations.

Part V of the order requires American Tobacco to distribute copies of the order to each of its operating divisions and to various officers, agents, representatives or employees of American Tobacco.

Part VI of the order requires American Tobacco to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Part VII of the order requires American Tobacco to file with the Commission one or more reports detailing compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify any of their terms.

Donald S. Clark,
Secretary.

[FR Doc. 94-25333 Filed 10-12-94; 8:45 am]

FEDERAL TRADE
COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

THE TOBACCO INSTITUTE, INC.
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

296-8434

HORACE R. KORNEGAY
PRESIDENT & EXECUTIVE DIRECTOR

Federal Trade Commission December 17, 1970
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission's Press Release of October 1, 1970, requesting cigarette manufacturers to advise the Commission exactly how they voluntarily intend to disclose "tar" and nicotine content in cigarette advertising under a voluntary program, I am pleased to transmit to the Commission the enclosed letter, which constitutes a revision of the letter and memorandum forwarded to the Commission on October 23, 1970, signed by Brown & Williamson Tobacco Corporation; Larus & Brother Company, Inc., Trading as The House of Edgeworth; Liggett & Myers Incorporated; Lorillard, a Division of Loew's Theatres, Inc.; Philip Morris U.S.A.; R. J. Reynolds Tobacco Company; Stephano Brothers; and United States Tobacco Company.

The companies are aware of the Commission's view, as expressed in the Press Release, by Chairman Miles W. Kirkpatrick, that "A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately."

In submitting the program embodied in the enclosed letter on behalf of these companies, I have been directed to state further on behalf of each of them that it is not to be considered an admission that the Federal Trade Commission is authorized to promulgate a trade regulation rule, or that this voluntary program may be included for any purpose in any public hearing held on the Federal Trade Commission's proposal of August 8, 1970, or any like proposal.

While each company will fully adhere to the voluntary program submitted, it does not by doing so admit that the failure affirmatively to disclose in its advertising any "tar" and nicotine test results, which the Federal Trade Commission from time to time determines and publishes, constitutes a violation of law.

I understand that Liggett & Myers Incorporated is writing a separate letter to the Commission explaining the basis upon which it is a signatory to the voluntary proposal submitted.

In order to facilitate the Commission determination, I am enclosing a memorandum of some explanatory material and facts underlying the provisions of the proposed voluntary program.

Very truly yours,
/s/
Horace R. Kornegay

Enclosures

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

Federal Trade Commission
Washington, D.C. 20580

Gentlemen:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade commission published test results, under its present methodology, in all advertising in newspapers, magazines, and other periodicals published and distributed in the United States, including newspapers, magazines, and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, in advertisements appearing on billboards in the United States, in advertisements printed on handbills and in direct mail circulars that are distributed to consumers in the United States, and in advertisements on signs, displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commis-

sion, from the Commission test results most recently published in the Federal Register. However, in order to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, each company may use the "tar" and nicotine data from the published Commission test results covering the test prior to the most recently published test, in lieu of the most recently published test results, (a) in all advertising in those issues of newspapers, magazines, and other periodicals for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type to the production house, is less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (b) in all advertising printed on handbills and in direct mail circulars which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register; (c) in all advertising appearing on billboards which is delivered in final form to the printer, or is painted or assembled, less than thirty working days after publication of the most recently published Commission test results in the Federal Register; and (d) in all advertising printed on signs displayed inside of stores and other places of business selling cigarettes, which is reasonably not expected to be exposed to the public beyond a six month period, which is delivered in final form to the printer less than thirty working days after publication of the most recently published Commission test results in the Federal Register.

The disclosure will be in the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette, FTC Report (date).

Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the adver-

tised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months.

Where the most recent Commission published test results do not include a variety then manufactured or primarily distributed and advertised by any company, that company will disclose in its advertising, until Commission test results on that variety are next published, the "tar" and nicotine values determined by that company in its own "tar" and nicotine test on that variety conducted in accordance with the present Federal Trade Commission methodology. In the interval prior to the publication of Commission test results, that company will utilize the following language:

_____ mg. "tar", _____ mg. nicotine
av. per cigarette by FTC method.

If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

In the event that any company determines from test data that the "tar" or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain

from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test results within forty-five working days, then the company will utilize, in accordance with this program, test results of the Tobacco Institute Testing Laboratory on the market sample until such tine as the Commission test results are made available to it.

The submission or the carrying out of this program does not constitute an admission by any company that "tar" and nicotine have any significance in relation to human health.

Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

Respectfully submitted,

BROWN & WILLIAMSON TOBACCO CORPORATION

By /s/_____
Addison Yeaman,
Executive Vice President

LARUS & BROTHER COMPANY, INC., TRADING AS THE HOUSE OF EDGEWORTH

By /s/_____
W. Brooks George,
Chairman of the Board

LIGGETT & MYERS INCORPORATED

By /s/_____
Milton E. Harrington,
President

LORILLARD, a Division of Loew's
Theatres, Inc.

By /s/_____
Curtis H. Judge, President

PHILIP MORRIS U.S.A.

By /s/_____
Ross R. Millhiser, President

R.J. REYNOLDS TOBACCO COMPANY

By /s/_____
Colin Stokes, Chairman of
the Board

STEPHANO BROTHERS

By /s/_____
Constantino Stephano

UNITED STATES TOBACCO COMPANY

By /s/_____
L.A. Bantle, President

FEDERAL TRADE COMMISSION
RECEIVED
DEC 18 1970
SECRETARY

December 17, 1970

EXPLANATORY MEMORANDUM RELATING TO VOLUNTARY PROGRAM FOR "TAR" AND NICOTINE DISCLOSURE

The following memorandum is intended to provide some explanatory material relating to various portions of the letter of December 17, 1970, forwarded to the Commission by eight cigarette manufacturers.

ADVERTISING COVERED

This program is applicable to cigarette advertising in newspapers, magazines, and other periodicals; as well as advertising on billboards, on handbills, and in direct mail circulars; and on signs displayed inside of stores and other places of business selling cigarettes, which are reasonably not expected to be exposed to the public beyond a six month period. Certain promotional or display items such as ashtrays, cigarette lighters, decals, display units, and pencils imprinted with cigarette advertising, are not included because there is no practical way to change "tar" and nicotine figures thereon, were they used on these items, to reflect changes in the "tar" and nicotine content of the variety of cigarette mentioned. Many items of this nature pass from the control of the company concerned or are semi-permanent and may last for a number of years. If such items were included in this program, this would lead to the presence of old, and perhaps inaccurate figures being presented to consumers, and consumer confusion would be engendered by the conflict between those figures and current figures being advertised.

In order to eliminate any possible confusion, the term "billboards" shall mean:

(1) Media billboard advertising messages on the following structures exposed to the general public:

2-30 Sheet Billboards;
Painted Billboards;
Spectacular Billboards; and

(2) Advertising messages on the following structures or transportation vehicles exposed to the general public:

Trucks;
Public Transit Vehicles;
Transit Station Platforms;
Transportation Terminals.

A sign on a plant, warehouse or other facility related to the manufacture of cigarettes, which identifies such plant, warehouse or facility is not considered a billboard within this program.

LEAD TIME

All advertisements must be submitted in advance of their publication date by some period of time, usually called the lead time, which varies from periodical to periodical. This lead time is several weeks for some periodicals and several months for others. Necessarily, when the Commission publishes a new report of test results on June 1st, it is physically impossible for the figures included in that report to appear in June and July advertisements in some periodicals. A workable solution is provided to this problem in order to make this voluntary program capable of practical implementation in the light of requirements dictated by the mechanics of publishing and advertising.

Any workable solution to this problem must inescapably utilize ascertainable dates when definable acts must take place. The program does this. It utilizes publication in the Federal Register of the Commission test results as a starting date, which is definitely ascertainable, and it employs dates such as closing date and delivery in final form to the printer

in order that it can be precisely determined when the time period terminates. These dates of delivery to the printer and closing date were, selected, rather than the date of the appearance of the periodical in homes or on newsstands, or the date on the cover of a periodical, because the dates specified are the times at which control over the advertising passes from the hands of the cigarette company.

In employing the date of publication of the Commission test results in the Federal Register, it is recognized that the company advertising cannot as a practical matter require the Commission to publish its results in the Federal Register. It is anticipated, however, that the Commission will accept the responsibility regularly, and at not more than six month intervals, to publish its results in the Federal Register.

In the case of billboards, handbills, and direct mail circulars, in addition to complying with the lead time requirements, each company will use its best efforts to have "tar" and nicotine figures appearing based upon published Commission test results as recent as practically possible.

THE LANGUAGE OF THE DISCLOSURE

The legends set forth in the program for disclosing "tar" and nicotine are intended to supply sufficient information to explain the source and nature of the "tar" and nicotine figures disclosed without confusing the consumer. An abbreviation for the word average is included to make it clear that the FTC figures are not based on testing individual cigarettes, but are instead averages of the averages obtained by smoking five cigarettes on each or twenty ports.

In the first legend, relating to a Commission market pick-up, the FTC Report, from which the "tar" and nicotine figures are taken is to be identified by its date in the form of an abbreviation of the month and year, e.g., Jan. '71.

CONTINUATION OF COMMISSION TESTING

This entire program is predicated upon the continued testing by the Federal Trade Commission at regular and periodic intervals of approximately ~~4-6 months~~. Obviously if the Commission should, for some reason, totally discontinue its testing operations, or fail to conduct and publish new test results at least six months after an earlier test has been published, then it would be uninformative to consumers if each company continued to use the old, out-dated figures obtained in an earlier Commission test.

THE COMMISSION'S FAILURE TO TEST AN EXISTING VARIETY

Cigarette companies sometimes market certain varieties in only a few localities, or in relatively small quantities. Under the current system of Commission pickup of market samples, a situation might occur in which the Commission failed to pick up any cigarettes of an advertised variety or a sufficient number to permit testing.

The program provides that in such cases each company may conduct its own tests in accordance with the present Commission methodology and in the interim utilize the results of its tests in advertising. This provision is necessary because no company will have control over the Commission testing, and it is of course possible that the Commission may, for some reason, fail to test cigarettes of one or more advertised varieties. It is not reasonable that such a failure on the part of the Commission should effectively preclude advertising of that variety because of the absence of Commission "tar" and nicotine figures. It is only to avoid this possibility that the company concerned may use its own test results on existing varieties. It is to be emphasized, however, that it is extremely unlikely as a practical matter that with an organized Commission testing program the Commission would ever fail to test one or more existing varieties.

NEW VARIETIES

Cigarette companies sometimes begin marketing new varieties of cigarettes to respond to various consumer demands and other marketing factors. The effective marketing of these new varieties requires that "tar" and nicotine figures for those varieties be obtained in a very prompt way which will not require time consuming procedures to protect information believed by the cigarette company to be a trade secret and commercially valuable. The program provides an effective procedure in that situation by disclosure of "tar" and nicotine on the basis of the company's own testing in accordance with the Commission methodology until the next Federal Register publication.

CHANGES IN THE "TAR" AND NICOTINE CONTENT IN VARIETIES OF CIGARETTES

The "tar" or nicotine content of some varieties of cigarettes may change from time to time. Sometimes these changes are relatively small and at other times these changes may represent a substantial percentage of the preceding "tar" and nicotine figures. Some of these changes are the result of a decision of a cigarette company to alter cigarette design or formulation, as, for example, the use of a longer filter. Other changes may be the result of variations in tobacco crops which cannot be controlled. The program provides a suitable procedure to be used in connection with these changes when they are significant in order to make available to consumers test results which are more current than those earlier published. During the period until more current test results are available, the company will utilize the latest published Commission test results.

COMMENCEMENT

Thirty working days, i.e., the lead time, are required for this program to become effective after its consideration by the Commission. This means that if notice of Commission consideration is received on December 22, for example, then

"tar" and nicotine data will be included in all advertising placed more than thirty working days after December 22 in accordance with this program.

[SEAL]
THE CHAIRMAN

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bob Whittaker
Ranking Republican Member
Subcommittee on Transportation, Tourism,
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Luken and Whittaker:

Thank you for your letter of July 6, 1988 raising certain additional questions concerning our letter of June 17, 1988, commenting on the provisions of H.R. 4543, The Cigarette Testing and Liability Act of 1988. The Commission appreciates the opportunity to provide additional comments on the important issues raised by your proposed legislation.

You first asked how many tests would have to be conducted each year to establish a credible threat of a test to verify the validity of a cigarette company's own test figures. The Commission believes that, for tar and nicotine test figures, random testing of a very small number of brand varieties would establish a very credible threat of detection of in-

accurate tar and nicotine information currently being disclosed to consumers.[1]

There are, however, three major differences between the testing proposed by H.R. 4543 and the industry's existing, voluntary tar and nicotine disclosure program. Although H.R. 4543 appears to envision testing constituents beyond tar, nicotine and carbon monoxide there is currently no standardized testing protocol for testing such constituents. It is impossible to verify testing results without agreement on a precise protocol for the testing.[2]

Second, assuming that such a uniform testing protocol that would produce replicable results (that is, results that would not differ significantly from test to test) were established, H.R. 4543 imposes no legal obligation on the companies to test for any constituent or disclose this information to the government or consumers.[3] Similarly, there is no current

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[1] As indicated in the Commission's May 7, 1988, testimony before this Subcommittee, there are other factors that help insure the accuracy of current tar and nicotine data. Each of the major cigarette companies either has a laboratory of its own or has access to a laboratory to do tar and nicotine assays. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we would hear quickly from its competitors. Indeed, the Brown & Williamson case arose not as a result of Commission testing or monitoring but because of competitors' complaints.

[2] A testing protocol that was designed to simply identify the presence or absence of constituents or whether certain constituents were present in an unusually high amount presumably would be easier to establish than one which seeks to both identify and rank them in its present form. H.R. 4543 appears to envision quantitative testing.

[3] We therefore assumed in our prior comment that the Subcommittee intended the Commission to test a much broader sample of brand varieties than would be needed simply to verify industry reported figures.

program for voluntarily disclosing information on tobacco constituents beyond tar and nicotine to consumers.

Third, the present tar, nicotine and carbon monoxide testing program is limited to the six major cigarette companies, whose sales are estimated to encompass over 99% of the U.S. market. It is impossible to judge how accurate the results of other smaller and less sophisticated manufacturers and importers would be in the event they were required to disclose this information.[4]

Assuming these three differences could be corrected, however, there is no reason why random testing of a very small sample of brand varieties would not establish a sufficient deterrent to inaccurate constituent reporting.[5]

You next ask whether the data that would be generated by the testing required under Section 2 of the bill would be useful in future advertising enforcement actions by the Commission. As indicated previously, because current cigarette advertising does not disclose constituent information beyond tar and nicotine,[6] and the proposed legislation does

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[4] Significantly, however, the current agreement among industry members for testing of tar, nicotine, and carbon monoxide by the Tobacco Institute Testing Laboratory ("TITL") allows any non-participating company to obtain testing on payment of a user fee. Testing done in the TITL labs would not raise the same verification concerns as independent testing done by small manufacturers and importers.

[5] The Commission has already indicated that random testing is one method that it can use to verify the results of industry-generated tar, nicotine and carbon monoxide figures. See Prepared Statement of Federal Trade Commission on Cigarette Tar and Nicotine Testing, Before the Subcommittee on Transportation, Tourism and Hazardous Materials, May 7, 1987.

[6] The commission's 1981 Staff Report on Cigarette Advertising recommended that Congress consider requiring disclosure of carbon monoxide, and in September 1982 the Director of the Commission's Bureau of

[Footnote continued on next page]

not require such disclosure, it is unclear to us how such information would be useful in future advertising enforcement actions.[7]

Incidentally, we want to correct the record with respect to the Subcommittee's apparent assumption that because the Commission has not challenged the advertisements of any cigarette brand since 1983, it has not taken any enforcement action involving unfair or deceptive advertising in the cigarette industry during that period. As we believed the Subcommittee was aware, the Commission is currently engaged in litigation with R.J. Reynolds Tobacco Company over a question involving cigarette advertising.[8]

You have also requested that the Commission submit additional comments on Section 2 of the bin, particularly addressing any evidence on the extent to which the current costs of smoking would be reduced by providing consumers with the additional testing data called for in Section 2. The staff has reviewed the written statements cited in your letter. Each of these statements, to a greater or lesser degree, bases its support for Section 2 of H.R. 4543 on the premise that accu-

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[Footnote continued from previous page]

Consumer Protection endorsed legislation requiring disclosure of tar, nicotine and carbon monoxide on cigarette packages. See Letter from Timothy J. Muris, Director, Bureau of Consumer Protection, to The Honorable John D. Dingell, Chairman, House Committee on Energy and Commerce, at 22 (September 1, 1982). Congress has never enacted such a requirement.

7 In that regard, we note that the Surgeon General and the National Cancer Institute have already identified several thousand constituents of tobacco smoke but have not indicated any specific constituents beyond tar, nicotine and carbon monoxide that they believe should be reported separately.

8 We, of course, express no opinion on the merits of this litigation.

rate comparative data on tar, nicotine and carbon monoxide content will no longer be available in light of the Commission's decision to close its cigarette testing laboratory.[9] As we explained in our June 17th letter, that is not the case. Comparative tar, nicotine and carbon monoxide figures continue to be generated by the Tobacco Institute Testing Laboratory under a well established methodology. The Commission, through a staff contractor, has unrestricted access to the laboratory to monitor the testing procedure, and in addition, the FTC can verify TITL test results through random testing by a contract laboratory. The industry, in addition, is reporting this information to the Commission, and the Commission will continue to report it to Congress on a regular basis, as it has for many years.

In addition to concerns about continued availability of accurate comparative tar, nicotine and carbon monoxide test data, Dr. Munzer of the American Lung Association testified that the testing program called for by H.R. 4543 was neces-

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[9] See, e.g., Statement of Steven D. Stellman at 3-4 (June 8, 1988) ("I wish to stress the importance of the FTC data collection program to basic research on smoking related disease. . . . [W]e fear that our ability to continue to provide such analytic data, such as our ability to relate differences in cancer mortality to cigarette yield, will be hampered by the absence of reliable and routinely available data on the relative exposures of people smoking different brands."); Statement of Robert E. McAfee, M.D. at 2 (June 8, 1988) ("We believe that the government should again measure cigarette smoke so that, at the very least, a smoker will be aware of the harmful constituents being emitted from cigarettes and how one cigarette type compares with another."); Statement of Alfred Munzer, M.D. at p. 5 (June 8, 1988) ("Second, tasting limited to tar and nicotine tells us nothing about carbon monoxide yields of different cigarettes."); Statement of Scott D. Ballin, at 2-3 (June 8, 1988) ("Cigarettes advertised as low tar or low nicotine may have high levels of carbon monoxide and other harmful constituents; yet cigarette companies do not provide consumers or the government with this information and the government currently has no way of obtaining or requiring disclosure of this information".)

sary because of concerns about compensatory smoking, concerns about possible alteration of cigarette smoke constituents in low tar cigarettes, and the belief that current tar and nicotine data is deceptive unless accompanied by a full listing of the relative levels of the other constituents in tobacco smoke. Additionally, Mr. Ballin of the American Heart Association expressed concerns that the full listing of chemical additives to tobacco is currently unknown.

With respect to concerns expressed about compensatory smoking, the Commission shares the Subcommittee's concern about studies of the effects of compensatory smoking that raise questions about how consumers perceive and use existing tar and nicotine information. This issue is a long-standing one that was reviewed by the Surgeon General in 1981, was examined in the FTC's litigation with Brown & Williamson, and has been raised in connection with the staff's ongoing review of the current testing methodology. Although the existence of compensatory smoking behavior is now well established, a method of adjusting the current testing methodology to reflect it has proved elusive. To date, no cigarette company, scientific agency, or health group has offered the Commission a viable alternative to the present testing system. As indicated in our June 17th letter, however, the Commission staff is currently awaiting the results of a Department of Health and Human Services study on how consumers perceive and use existing data. That study may provide the basis for future recommendations in this area.

The second general concern expressed by Dr. Munzer is that changes in cigarette manufacturing technology designed to lower the tar level of cigarettes may have introduced new constituents into cigarette smoke or harmfully altered previously existing cigarette smoke constituents. This question seems to raise scientific issues that are beyond the scope of a routine constituent testing program administered by a law enforcement agency. Routine random testing by its very nature would seek to determine the amounts of a specific list of

constituents, not to test for the presence of new constituents. Similarly, it seems premature to begin random testing of relative levels of constituents until there is consensus as to what constituents should be tested and what levels are of concern.[10]

With respect to concern about tobacco additives, the Comprehensive Smoking Education Act already requires cigarette manufacturers to provide the Secretary of Health and Human Services with a list of the ingredients added to tobacco.[11] Under the statute, the ingredients list does not identify the supplying company or the brand of cigarette,[12] and the information is expressly non-public.[13] If the Subcommittee determines that disclosing tobacco additive information would have an impact on consumer purchasing decisions, the most logical first step would be to amend the current federal law to delete the provision which prohibits the Secretary of Health and Human Services from disclosing the information that is already reported and, if necessary, require that the information be reported on a brand variety basis.

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10 We note that the agency charged by law with responsibility for conduct and support of research on the effect of smoking on human health, the Department of Health and Human Services, reports spending $3 million on "identification of harmful constituents in tobacco smoke." We question whether additional research is necessary, or whether that research could be conducted with existing funding. See, U.S. Department of Health and Human Services, Prevention 86/87 (1987) at 154.

11 15 U.S.C. 1335a.

12 15 U.S.C. 1335a(a).

13 15 U.S.C. 1335a(b)(2)(A) (The Secretary is required to report to Congress information pertaining to any such ingredient judged to be a health risk and may otherwise make the list available to Congress if it is requested by a subcommittee or committee).

Our June 17th letter also expressed the concern that it could potentially cost millions of dollars for the Commission to produce, through testing, the comparative listing of tobacco additives and constituents that may be envisioned by Section 2, and that there was no mechanism for distributing this information to consumers even if it were produced.[14] Similarly, we expressed our concern that consumers would find using a comparative listing of thousands of tobacco constituents (such as "Butylamine" and "Diethylamine") impractical and cited testimony by Dr. Guerin that cigarettes would remain in roughly the same ranking even after this analysis. Indeed, according to Dr. Guerin, if consumers used such information to select a cigarette that was relatively low in a specific commonly known constituent such as ammonia, but had a higher overall tar level, they might actually be injuring their health.

In short, the Commission shares the Subcommittee's concern about the health costs associated with smoking. The government already spends millions of dollars to correct this problem, and it is important in this area as in all others to ensure that our expenditures will obtain the intended results.[15] As indicated in our June 17th letter, to the extent that the intent behind Section 2 of H.R. 4543 is to provide consumers

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14 It is also unclear whether simple reporting of test results of a random sample of brand varieties would provide useful information to consumers. Although the FTC publishes tar and nicotine results for all varieties, consumers are exposed to this information primarily from voluntary tar and nicotine disclosure in all cigarette advertising and on some packaging.

15 The exact expenditures on smoking and health issues is apparently unknown, although the Department of Health and Human Services alone reports spending $40.5 million in 1986 on "smoking control." U.S. Department of Health and Human Services, Prevention '86/87 (1987) at 158. Of this amount $3.7 million is reported to have been spent on "identification of harmful constituents in tobacco smoke." Id. at 159.

with additional information about the constituents of cigarettes, we continue to believe that the most efficient means is simply to identify the constituents involved and require the cigarette companies to disclose this information on the labeling for cigarettes, rather than providing a taxpayer-subsidized Federal testing program to supply this information.

Your final question relates to the preemption provision of the bill. Referring to the advertising expenditure figures contained in the Commission's 1986 Cigarette Report to Congress, you ask whether Congress should permit state and local governments to regulate cigarette advertisements in newspapers, magazines, on billboards or other outdoor structures, on transit vehicles, and at point-of-sale. You ask, specifically, whether Section 3 of the bill would have varying effects on these different types of advertising. You further ask what impact there would be on these types of advertising if Congress prohibited additional, non-federal cigarette warning labels but otherwise gave state and local governments the power to regulate cigarette advertising and promotion.

The impact of proposed Section 3 of H.R. 4543 would clearly vary depending upon the type of advertising. Newspapers and magazines are often distributed across state lines and are frequently distributed nationally. For such advertising, complying with individual state health warning or affirmative disclosure requirements could serve as a functional ban on advertising. Transit advertising also can cross state lines; however, the geographical distribution is obviously more certain and limited, making it more possible to comply with different state health warning and affirmative disclosure requirements so long as the states do not themselves impose mutually inconsistent requirements. This would, however, leave open the concern of whether the state warnings are inconsistent with or otherwise undermine the Surgeon General's warnings.

Outdoor billboard advertising and point-of-sale advertising are obviously fixed in a particular geographic location and, therefore, are sore suitable for state regulation. Even for these media, however, the possibility of inconsistent or conflicting state and Federal warnings remains.

With regard to the question of legislation prohibiting non-federal cigarette warning labels, but otherwise giving state government the power to regulate cigarette advertising, the effect would again vary based on the type of advertising and regulation. For advertising that is interstate in nature, allowing such regulation could result in circumstances in which a single state imposes its decisions on citizens of other states or the entire country. For example, if one state were to decide that it is deceptive, per se, to advertise the tar, nicotine and carbon monoxide content of low tar cigarettes, that decision might operate to prohibit those disclosures in magazine and newspaper advertising in other states. Similarly, if a state prohibited cigarette transit advertising, that decision would presumably act to ban transit advertising in surrounding states if the vehicles cross into those neighboring states. Finally, such a revision would not end the potential for significantly inconsistent results. For example, if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict for advertising that appeared in both states. We believe that results such as these are very real possibilities, and urge the Subcommittee to carefully analyze the potential results of this proposal.

I hope that you will find this information helpful to your consideration of H.R. 4543.

By direction of the Commission,*

Daniel Oliver
Chairman

* Chairman Strenio dissenting. He will forward his views to the sub-committee separately.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No.
-vs-	)	99-CV-02496 (GK)
PHILIP MORRIS, INC.,	)	
et al.,	)	
Defendants.	)	

VOLUME I

Tuesday, July 30, 2002

9:09 a.m.

30(b)(6) videotaped deposition of C. LEE PEELER, held at law offices of Collier, Shannon, Scott, 3050 K Street, N.W., Suite 400, Washington, D.C., before Judith L. Leitz, a Registered Professional Court Reporter and Notary Public of the District of Columbia.

* * *

[Page 10, Line 1 through Page 21, Line 23]

VIDEO TECHNICIAN: My name is Jonathan Perry, I will be operating the video equipment for this deposition. My address is 642 A Street, Southeast, Washington, D.C. I am self-employed today representing Spherion Reporting, 1120 G Street, Northwest, Washington, D.C.

This deposition is being taken in Case No. 99-CV-02496 (GK) entitled the United States of America versus Philip Morris, Incorporated, et al., in the U.S. District Court for the District of Columbia.

The name of the witness is C. Lee Peeler.

Today's date is July 30th, 2002.

We are at the offices of Collier Shannon Scott, 3050 K Street, Northwest, Washington, D.C.

The time on the video screen is currently 9:10 and 46 seconds a.m.

The court reporter is Judith Leitz also with the firm of Spherion Reporting.

I'll now ask counsel present to please introduce themselves and state whom they represent.

MR. WAGNER: I'm Jeff Wagner and I'm here with Melanie Radler and Joe Franklin. We represent Philip Morris.

MR. GRAY: Richard Gray from Shook, Hardy & Bacon representing Lorillard Tobacco Company.

MR. BAILEY: Bill Bailey from Collier Shannon Scott with R.J. Reynolds.

MR. WILLIAMS: John Williams also with Collier Shannon Scott on behalf of Reynolds.

MS. OLDHAM: Judy Oldham also with Collier Shannon Scott.

MR. KLONTZ: David Klontz with the Department of Justice for the United States.

MS. SIMMONS: Jnatel Simmons for Philip Morris.

MR. SINGER: John Singer for the Federal Trade Commission.

VIDEO TECHNICIAN: I will ask the reporter to swear in the witness, please.

PROCEEDINGS

* * * * *

C. LEE PEELER,

called as a Witness, was duly sworn by Judith L. Leitz, a Notary Public in and for District of Columbia, and was examined and testified as follows:

* * * * *

EXAMINATION BY COUNSEL FOR THE DEFENDANTS PHILIP MORRIS, INCORPORATED

BY MR. WAGNER:

Q. Good morning, Mr. Peeler.

A. Good morning.

Q. What is your current title?

A. I'm the deputy director of the Bureau of Consumer Protection of the FTC.

Q. Do you have a role with the—are you the director of advertising practices?

A. I was the director of the division of advertising practices until August of last year, 2001, at which point I assumed my current responsibilities.

Q. Okay. As deputy director of the Bureau of Consumer Protection can you give me a brief description of your job responsibilities?

A. Sure, I assist the—the Bureau of Consumer Protection is one of the three main operating units of the Federal Trade Commission. It is comprised of enforcement divisions and the bureau supervises and formulates policy for those enforcement divisions. I work for the bureau director who is

Howard Beales and I assist him in his day-to-day responsibilities and supervising the work of the bureau.

Q. So you have a role with emulating and supervising policy of the FTC, correct?

A. Yes.

Q. Okay. Prior to—when you were the director of advertising practices, when did you assume that position?

A. October of 1985.

Q. And can you briefly describe your role as director of the Division of Advertising Practices?

A. Yes, the Division of Advertising Practices is a—one of the operating units of the Bureau of Consumer Protection. It specializes in national advertising issues and as the associate director for the Division of Advertising Practices it was my job to again supervise and manage the work of the division.

Q. How many people worked under you?

A. That would vary from time to time. Usually it was in the 30 to 40, 45 range.

Q. Are those the only two positions you've held with the FTC?

A. No.

Q. Okay. What did you do before you were with the director of Division of Advertising Practices?

A. Okay. I started at the FTC as a staff attorney in the Division of Credit Practices.

Q. When was that?

A. 1973.

Q. Okay. How long did you stay in that position?

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A. For a long time. I was in the division until 1980—I was in that division until 1983. I held a variety of roles in that division. I was what we call a program manager for the Fair Credit Reporting Act Program. I was an assistant director which is a position—is a management position in the division I think for about three years. And then I left that office to join the Bureau of Consumer Protection where I was the executive assistant to the director of the Bureau of Consumer Protection from 1983 to 1985.

Q. Who was the director at the Bureau of Consumer Protection at that time?

A. Carol Crawford.

Q. And as the executive assistant to Ms. Crawford, what were your job responsibilities?

A. I assisted her in her day-to-day management and supervision of the bureau—work of the bureau.

Q. Did you help with formulating policy?

A. That wasn't as much a policy job as an implementation job.

Q. Prior to the time when you joined the Bureau of Consumer Protection as the executive assistant to Ms. Crawford did you have any dealings with cigarettes?

A. No.

Q. Okay. I sort of jumped right into all of your job responsibilities and history without doing any of the usual preliminaries. Have you been deposed before?

A. Yes.

Q. Okay. How many times?

A. Twice, I think.

Q. In what cases?

A. The—is it Rexall or Enforma? It was either the Rexall or the Enforma litigation which is ongoing and then many years before in the Freedom of Information Act case brought by the associated credit bureaus.

Q. Neither of those had to do with cigarettes, right?

A. Right

Q. Just as a general ground rule of the deposition I'll ask questions, you'll give answers.

If—I think we're supposed to try not to talk over each other so the court reporter can get everything if that is okay with you.

If there's anything I ask that you don't understand, just tell me and I'll try and clarify the question so that you can understand it and then give an answer.

And you also need to give your answers orally so that the court reporter can be taking them down, is that okay?

A. Fine.

Q. One other rule, any time you want a break, say it, we'll take a break.

A. Okay.

Q. I want to make sure that you're comfortable in the deposition.

You are an attorney, right?

A. Yes.

Q. Okay. When did you graduate from law school?

A. 1973.

Q. From?

A. Georgetown.

Q. Are you licensed to practice?

A. Yes, in the District

Q. Okay. I'm going to mark as Peeler 1 the notice of deposition for today and have you take a look at that, okay?

(Peeler Deposition Exhibit No. 1 was marked for identification.)

MR. SINGER: Just as a clarification, Jeff, and this is a minor one, we received—actually, Lee is here pursuant to Rule 45 under the Rules of Civil Procedure as a 30(b)(6) designee and is not here just under Rule 30 since the FTC has not required it since I don't think the subpoena is attached to this.

MR. WAGNER: Fair enough.

MR. SINGER: Not a big deal but just to clarify the record.

Thank you.

I want you to know we did receive a subpoena, though.

A. Okay. I've looked at this in general.

BY MR. WAGNER:

Q. Have you seen this before today?

A. Yes.

Q. And you understand that you have been designated to testify on behalf of the Federal Trade Commission, correct?

A. Yes.

Q. Okay. And there are a number of topics that are listed on Attachment A to Peeler Exhibit 1, right?

A. Yes.

Q. There are seven topics listed there?

A. Right.

Q. And are you prepared to discuss all of those topics today?

A. I am prepared to testify what I know and what I could find out about these topics. They are—

Q. They're broad?

A. Extremely broad. I don't think there's anybody that knows everything about all of this stuff.

Q. When did you first learn that you would be asked to testify in this case?

A. I got a call probably in the spring from the general counsel's office saying that they'd been told by the Defendants that several of us would be asked to testify.

Q. Okay. Did you meet with anyone or speak with anyone in order to prepare for the deposition?

A. Yes.

Q. Who?

MR. SINGER: Can I just give you an instruction, to the extent you met with counsel, don't discuss the substance. You can say who you met with, though.

A. Okay. Well, I met with counsel. I met with members of the FTC tobacco team I have talked to members of the Bureau of Economics. That's about it.

BY MR. WAGNER:

Q. You mentioned the FTC tobacco team, what's that?

A. There are attorneys in the Division of Advertising Practices who work on tobacco matters, that's not their exclusive responsibility, but they are often asked to review tobacco issues and we informally call them the tobacco team.

Q. It's just an informal name?

A. Very informal.

Q. A group of people that work with the FTC Division of Advertising Practices, right?

A. Correct.

Q. And this group has existed in one form or another for as long as you have been with the Bureau of Consumer Protection, right?

A. Well, again, let's talk about from 1983 forward because as we—

Q. That's what I'm asking, from the time you began at the Consumer Protection 1983 forward there's always been a group?

A. There has been an identifiable group of attorneys that work on tobacco issues as long as I've been there.

Q. And what's been the size of the group more or less?

A. It varies. It's usually in the three attorney range. We also have responsibilities that began I think in '84 or '85 to review rotational warning plans and there's normally a paralegal assigned to that. And we normally have a person whose responsibility it is to process the data for our annual reports.

Q. Those are the annual reports to Congress?

A. Annual reports to Congress on the cigarette advertising and later on smokeless tobacco advertising.

* * *

[Page 42, line 2 through Page 45, line 25]

Q. What was your role with that one?

A. Again, you know, for both of those cases the investigations were conducted by staff attorneys. They would have reported to a senior program manager type of person and that person would have reported to me.

Q. Okay. And then ultimately you were the one that makes a recommendation as to whether or not an enforcement action ought to be brought?

A. The staff makes a recommendation. I, you know, approve it.

Q. And what happens once you approve a recommendation

A. It goes to the—

Q. —for an enforcement action?

A. It goes from the division to the Bureau of Consumer Protection.

Q. Okay.

A. Where there is a general review of the recommendation, the bureau director decides whether or not they will support that particular recommendation. If the bureau director decides they will support it, it's forwarded to the Commission where it's reviewed by the commissioners. If the bureau director decides he won't support that particular recommendation, normally it comes back to the staff for more work.

Q. Okay. Is there a point in time during this process when the Bureau of Economics gets involved?

A. Varies considerably. By—certainly a recommendation that's forwarded to the bureau is forwarded—is, in almost all cases, forwarded to the Bureau of Economics for their review. In other instances the Bureau of Economics has already been involved in the case and it, you know, really varies based on the case.

Q. Okay. What role did you play with respect to the 1997 notice and comment regarding the FTC test method and the use of descriptors such as light and ultra light?

A. The notice was, again, prepared by staff members and reviewed by a program level person and then approved by me.

Q. And do you have a continuing involvement with that proceeding?

A. My role in the division is being fulfilled by the new division director and in her absence by an acting division director.

Q. Okay.

A. I still have involvement in that issue in my new capacity in the bureau.

Q. As of this point has the division director made a recommendation to you regarding the final disposition of that proceeding?

MR. SINGER: I would instruct you you can answer it yes or no to that, however, if it's—since it's a pending matter I would instruct it would be privileged and not public beyond that.

A. No.

BY MR. WAGNER:

Q. Okay. And, therefore, the proceeding is open, correct?

A. Yes.

Q. Okay. Did you play any role with respect to the FTC's 1998 inquiry of Philip Morris regarding its Marlboro Lights and Marlboro Ultra Lights cigarettes?

A. It was conducted by staff attorneys in my division.

Q. So you were their supervisor?

A. I was their supervisor, right.

Q. Did you play a role with respect to the FTC's response to Senator Lautenberg's November 1998 request to either ban or suspend the cigarette manufacturers right to use descriptors such as "light" and "low tar" in cigarette marketing?

A. I would have. I don't have any remembrance of the specifics.

Q. Okay. Now, based upon your experience, you are familiar with the FTC's regulatory and enforcement structure in general, correct?

A. Yes, I am.

Q. Okay. In fact, you've written and I presented an extensive piece on it, have you not?

A. I may have.

Q. Okay. We're going to mark as—I may have.

A. Do you want to show me what you're

Q. Yeah, I will.

* * *

[Page 94, line 1 through Page 101, line 19]

Q. Okay.

A. Do you want to show me—

Q. I'm not trying to—

A. Okay.

Q. —you know, test your memory or anything. I'm going to mark as Peeler—4?

MR. SINGER: Yes.

MR. WAGNER: Okay.

(Peeler Deposition Exhibit No. 4 was marked for identification.)

BY MR. WAGNER:

Q. Well, just—this is something we'll refer to from time to time. It is the transcript of the NCI Conference that took place on December 5th and 6th—

A. Okay.

Q. of 1994.

You were there, right?

A. I was there.

Q. Okay. You were the first speaker, correct, after the introduction by Dr. Freeman?

A. I—I may have been.

Q. Okay.

A. But I certainly spoke.

(Off the record.)

BY MR. WAGNER:

Q. Let me direct your attention to Page 11, the first day.

(Off the record.)

A. Uh-huh.

BY MR. WAGNER:

Q. Okay, unfortunately, these aren't numbered by lines. By the way, have you seen this transcript before?

A. I don't know that I personally saw it. I'm sure someone in my office saw it.

Q. Okay. If you'll look at the one, two, three—well, I'm in the first full paragraph that says, "Let me turn now to the history of the FTCs involvement in tar and nicotine testing."

A. Okay.

Q. If you'll look at the third sentence, didn't you say "All of our involvement, I would emphasize, has been taken under the FTCs general authority to prevent deceptive practices in advertising and labeling."

A. Yes.

Q. Okay. That's the only point I'm—I'm getting at with these questions.

A. Okay.

Q. Okay. But now—

A. The point I was trying to make is that the, you know, operation of the cigarette lab was really something that was unique and, you know, was designed to prevent a certain type of deception, but, you know, as we said when we closed the lab it was unusual for a program like that to be maintained by the Commission.

Q. Right. We're going to talk about that specifically. There are other industries that run testing and it was unusual for the Commission itself to be running the testing for the cigarette industry, right?

A. It is both unusual for the Commission to be running the testing and to be the agency that specified the testing methodology because

Q. Okay.

A. —I can't recall any other instances where the FTC itself specifies the testing methodology.

Q. Okay. Is it fair to say that the cigarette advertising has been a major concern of the Federal Trade Commission since it began examining cigarette advertising in the late 1930s?

MR. SINGER: Objection to form, particularly the use of the word "major."

You may answer to the extent you can.

A. It certainly has been a concern of the FTC. It has been an area of activity and an area where we have staff assigned.

MR. WAGNER: I'll mark another big document that we'll use from time to time.

THE WITNESS: Okay.

BY MR. WAGNER:

Q. You're aware that the FTC conducted an investigation of cigarette advertising from May 1976 through sometime like May of 1981, correct?

A. The beginning date sounds right. I'm not sure about the ending date. I mean, the ending date is when we issue the report and I assume that was writing the report.

Q. Right, there was a staff report that was published in May of 1981, right?

A. Right.

Q. And I'm going to mark as Peeler 5 the public version anyway of the FTC staff report.

(Peeler Deposition Exhibit No. 5 was marked for identification.)

A. Okay.

BY MR. WAGNER:

Q. You recognize this?

A. Yes.

Q. This is—

A. This is the public version?

Q. Well, it says on the top "Public Version."

A. Okay.

Q. It's a little hard to read.

A. Okay.

Q. But this is an agency document, right?

A. It's a staff report.

Q. Okay. This report, as a matter of fact, was approved by the Commission for transmission to Congress, was it not?

A. Yes.

Q. Okay. Now, if you look at Page 4-1, Chapter IV, the first page, which is about halfway through the document.

MR. SINGER: Jeff, what is the date on this again, I'm sorry?

MR. WAGNER: May 1981.

MR. SINGER: Thank you. I just couldn't read it.

A. Okay, so where are we?

BY MR. WAGNER:

Q. 4-1.

A. 4-1, okay.

Q. Okay. What's the first sentence of the text of that page?

A. "Cigarette advertising has long been a major concern of the FTC."

Q. Since?

A. Right under a heading that says "Cigarette Advertising Has Long Been a Concern of the Federal Trade Commission."

Q. Right. And, so, the FTC staff after an investigation summarized some history and came to the conclusion that cigarette advertising has in fact been a major concern of the Commission since it began examining cigarette advertising in the late 1930s, right?

MR. SINGER Objection to form.

A. I mean, I'm not sure where you're going with it, but . . .

BY MR. WAGNER:

Q. Nowhere. I'm just—it says what it says, right?

A. That's what—that's what the report says, the report doesn't investigate the FTC, it's just looking at—

Q. Correct.

A. —you know, it was looking at the health warning issues involved in tobacco.

Q. Okay.

A. And, again, it is a staff report.

Q. Correct, a staff report that is approved by the Commission for transmission to Congress, though, right?

A. Well, the Commission sent it to Congress. They also, I think, put it on the public record for comment and they actually issued a—their own statement in 1984—

Q. Okay.

A. —saying what their conclusions were and I don't have a copy of that statement with me right now, but . . .

Q. Okay. Historically—I'm just trying to get a sense of the historical perspective now which is, you know, why—why I brought that to your attention.

A. Okay.

Q. The Commission's first actions with respect to—and I know you reviewed the history at least in part prior to your presentation at the NCI Conference in 1994, right?

A. With respect to tar and nicotine, yes

Q. Yeah, okay.

A. But not with—this is—was a much broader review.

* * *

[Page 158, line 7 through Page 213, line 25]

BY MR. WAGNER:

Q. And the FTC also had its other tools available such as cease and desist orders, correct?

A. Right, but, again, to—to take any action, the FTC has to show that, you know, in light of the evidence that exists at that time the practice is unfair or deceptive.

Q. Okay. Let's move forward in time.

A. Okay.

Q. After—

A. Good.

Q. Yeah. Well, we'll try and find a way. I think we're getting at least into areas that you did review the history and you did talk about at the NCI Conference so maybe it will be a little bit easier for you, although, it doesn't get much more modern.

In January of 1964, the Surgeon General issued its report on smoking and health, right?

A. Yes.

Q. And the FTC's view was that the 1964 Surgeon General report provided an evidentiary foundation to support a rule requiring a positive statement of average tar and nicotine yields in cigarette labeling and advertising, right?

MR. SINGER: Objection to form.

You may answer.

A. Well, I don't know if I would agree with your characterization, but they certainly issued the report. My written statement to NCI says that two years later the public health

service stated that the preponderance of scientific evidence clearly suggests that the lower the tar and nicotine content of cigarette smoke the less harmful the effect would be. And in that whole mixture of information the Commission took two steps in 1966 to encourage manufacturers to provide comparative information.

BY MR. WAGNER:

Q. Actually, even before the 1966 public health statement, though, the FTC initiated a trade regulation rule making proceeding, didn't it?

A. I don't know the date that the trade regulation rule was initiated. I know that there was a proposed trade regulation rule.

Q. This one I've got. I can help you out. Peeler 13—

(Peeler Deposition Exhibit No. 13 was marked for identification.)

A. Good.

BY MR. WAGNER:

Q. —is a copy of the Proposed Rule Making from January of 1964. It's published at 29 Federal Register Pages 530 through 532.

A. Okay, this was issued in January 17th, 1964.

Q. Right. That's within a week of the Surgeon General's report, right? Surgeon General report, I think, was January 11th.

A. Yeah, I don't know that, but it—

Q. Okay.

A. —it came out when it came out.

Q. Okay. Now, here in Peeler 13 the FTC was proposing a formal rule that would require health warnings on all cigarette packs and on all cigarette advertisements, right?

A. Oh, this is the 1964—

Q. Yes.

A. That was one of the proposals to the rule, yes.

Q. Okay. And the rule, I think it's Rule No. 3, that is proposed there, also would permit tar and nicotine yield statements provided that such statements were verified in accordance with a uniform and reliable testing measure approved by the FTC, right?

A. The proposed rule says that "No cigarette advertisement shall contain any statement as to the quantity of any cigarette smoke ingredient, e.g., tars and nicotine which has not been verified in accordance with a uniform and reliable testing procedure approved by the FTC."

Q. Okay. Now, if this role were enacted then that would reverse the policy of a ban on tar and nicotine yield advertising, right?

A. That's not clear to me just from reading that section. Let me look at what the comment says.

(Off the record.)

A. Well, this would allow targeting claims as cigarette advertising as long as it's done in accordance with a procedure that's been verified as reliable by the Commission and it's accompanied—it seems like it has to be accompanied—the example seems to indicate it has to be accompanied by a number of other disclosures.

BY MR. WAGNER:

Q. Right. But as long as it met those requirements now tar and nicotine yield disclosures would be permitted, right?

A. Yes.

Q. Whereas, prior to this time such disclosures were banned, right?

MR. KLONTZ: Objection.

A. Well, again—again, absent that press release in 1960 the Commission announced that there was an agreement among manufacturers not to advertise—

BY MR. WAGNER:

Q. Right.

A. —tar and nicotine content, so I assume that's a ban.

Q. Well, you characterize it as a ban—

A. Right.

Q. —at the NCI Conference.

A. Right, so—

Q. Okay.

A. —I assume that it's a ban.

Q. Okay. Now, the FTC recognized in the comments to these rules that disclosing, displaying or advertising tar and nicotine yield numbers would constitute a health claim, right? If you look at the comments—comments to Rule 3, the second sentence, it says, "A quantitative disclosure of cigarette smoke ingredients is a claim concerning the health consequences of smoking the advertised brand."

Do you see that?

A. I'm sorry, it's the second paragraph?

Q. Second sentence of the comments to Rule 3.

A. Okay. That's what it says.

Q. Okay. And this is an official statement of the FTC published in the Federal Register, right?

A. Yes, this is a proposed rule.

Q. Okay. And the FTC's position also was that consumer confusion could be obviated and the ability of con-

sumers to make an intelligent choice among competing brands protected if the measurements of tar and nicotine were made with a uniform testing procedure, right?

A. That's what it says.

Q. Okay. And the FTC believed at the time that it would be good to encourage a marketplace competition for the research development and marketing of low yield products, right?

A. I would have to look and see what they say in the statement of basis and purpose.

Q. Well, look at the comments. I think it's to Rule 2. See the second paragraph, in the second sentence of the second paragraph, it says, "Indeed, it is the Federal Trade Commission's policy to encourage the developments of less hazardous cigarettes."

Do you see that language?

A. Right.

Q. Okay. And by "less hazardous," the FTC was talking about a reduction in tar yields, right?

MR. KLONTZ: Objection.

A. You know, you have to bear with me because this is a—

BY MR. WAGNER:

Q. That's okay.

A. —very bad copy and I'm having—because—because, you know, this is a comment on part of the rule that seems to relate to—it says, "No cigarette advertisement shall state or imply, by words, pictures, symbols, sounds, devices or demonstrations, or any other combination thereof, that smoking the advertised cigarettes: Promotes good health or physical well-being; it is not hazardous—it's not a hazard to health; or is less of a hazard to health than smoking other

brands, except that a specific factual claim respecting the health consequences of" something "may be advertised if: The advertiser, before making the claim, has substantial reliable evidence to prove the accuracy and the significance of the claim; and all facts materials to the health consequences of smoking,"—

MR. KLONTZ: Could I make a general request. For the sake of the record being a little more complete, if either of you are going to read from one of these documents, read at a normal pace rather than faster because just because it's on the printed page doesn't mean the reporter is going able to take it down if you read it at 60 miles an hour which I think just happened now. I suspect that not all of that was put into the record.

THE WITNESS: Okay.

MR. WAGNER: All right.

MR. SINGER: Why don't we start over.

A. So my confusion is this section that has that comment in it is—seems to be talking about something different than Rule 3 which is talking about tar and nicotine content. But as I described in my written statement, you know, at some point, and I'm not sure if it's here or in the process of this rule making, the Commission did decide that it should encourage tar and nicotine claims with the specific reservation that there shouldn't be anything other than the tar and nicotine numbers, no accompanying health claim.

BY MR. WAGNER:

Q. And one of the goals underlying that FTC decision was to encourage the development of a marketplace competition for the research, development and marketing of lower yield cigarettes, right?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Just one of the goals?

A. The purpose was to encourage competition in among companies in lowering machine measured tar and nicotine yields in cigarettes.

Q. Perfect.

Now, at the time of this proposed trade regulation rule making in 1964, no such uniform and reliable testing procedure existed, right?

A. Not that I know about, although, you know, the—this is a little bit different approach than the ultimate approach that was taken. This says—

Q. Right.

A. —as long as—you can use the procedure as long as it's approved by the Federal Trade Commission.

Q. Right.

A. And the ultimate approach was for the FTC to specify the procedure.

Q. Right. After the—after the publication of the proposed rule a couple of significant things happened. First, Congress passed the FCLAA, right?

MR. KLONTZ: Objection.

A. That is correct. After the passage of the rule—

BY MR. WAGNER:

Q. Okay.

A. —legislation is enacted stating the rule.

Q. And the legislation—

A. But—

Q. Oh, sorry.

A. I need to make one—the final rule, at least what I read about the final rule in preparation for this, didn't seem to contain these provisions and there wasn't any discussion in the statement of basis and purpose that I saw about why those provisions weren't included in the rule.

Q. That's exactly where I was heading.

Well, the FTC's understanding of the FCLAA was that Congress had mandated specific warnings, right?

A. Again, we're talking about a period of time that predates me, but my understanding is—my understanding has always been that the FTC adopted the—as a result—as a part of this rule making the Commission adopted a 1964 rule which requires health warnings on cigarettes, I think labeling and advertising, but maybe just advertising. That the Commission delayed implementation and Congress enacted legislation stating the rule. What I was referring to is that—and, again, you know, I'm—this is just what my understanding of it is—

Q. Okay.

A. —is that somehow from this proposed rule to the adoption of the final rule, the—two provisions that we were just discussing were dropped out and I was not able to find any independent reason why they were dropped out

Q. Okay. We'll see if we can figure that out together.

In 1964, you're aware that the cigarette manufacturers also adopted the cigarette advertising code. right?

A. I know that they have adopted a cigarette advertising code.

Q. Okay. And the cigarette advertising code had a number of restrictions on cigarette advertising and marketing, right, it was an attempt at industry self-regulation?

MR. KLONTZ: Objection.

A. Again, in the materials I reviewed I read a copy of the code that you had provided and—or somebody had provided and it contains restrictions on different types of advertising.

BY MR. WAGNER:

Q. Okay. For example, the cigarette advertising code had a requirement that advertising be precleared with the code administrator, right?

A. I don't have independent knowledge of that, but it's in the code I assume.

MR. WAGNER: I'll tell you what, maybe we can—it's 12:30. Would you like to break for lunch. We can put a few more documents together.

THE WITNESS: I'm happy to do that.

That's fine.

MR. WAGNER: You want to do that?

THE WITNESS: Yeah.

MR. WAGNER: We'll put some documents together so that we can plow forward.

THE WITNESS: Great

MR. WAGNER: Okay.

VIDEO TECHNICIAN: The time is 12:29:39. We're going off the record.

(Lunch recess.)

VIDEO TECHNICIAN: The time is 1:24:37. We're back on the record.

(Peeler Deposition Exhibit Nos. 14 and 15 were marked for identification.)

BY MR. WAGNER:

Q. Welcome back, Mr. Peeler.

I put before you Peeler 14 which is a copy of the final Trade Regulation Rule issued June 22nd, 1964, as published in the Federal Register. And I'm also going to show you Peeler Exhibit 15, which is a copy of the cigarette advertising guides that we were discussing earlier.

MR. SINGER: Thank you.

BY MR. WAGNER:

Q. Because the two go hand in hand for these questions.

MR. SINGER: Is this cigarette advertising guide or cigarette advertising code?

MR. WAGNER: Cigarette advertising code.

MR. SINGER: Okay. Thank you.

BY MR. WAGNER:

Q. For the record, Peeler 15 is a document entitled "Robert B. Meyner," M-E-Y-N-E-R "Administrator Cigarette Advertising Code, Inc.," and it attaches a copy of the cigarette advertising code with Bates stamp numbers are 2071166550 through 5588.

A. Okay.

Q. Peeler 15 is the cigarette advertising code that we were discussing before lunch break, right?

A. Yes.

Q. And that's something that you've seen before?

A. I have actually prior to preparing for this not seen it except as it was reprinted in the New York Times so I don't know that I'd seen the same thing but I had seen it in preparation for this—

Q. Okay.

A. —deposition.

Q. And in reviewing Peeler 15 you see Article II of the cigarette advertising code provides for a code administrator, right?

A. Yes.

Q. Okay. And Article III has various sections referring to advertising clearance, has a section—

A. Yes.

Q. —on advertising clearance.

Okay. And that refers to pre-clearance of ads before they are run; is that correct?

A. Yep.

Q. Okay. And Article IV has various advertising standards that are detailed over the course of three and a half pages?

A. Seems to.

Q. And, then, Article V enumerates certain procedures in the event of a violation of the code, right?

A. That's what it says.

Q. Okay. Now, we were talking about the 1964 trade regulation rule that had three proposed rules in it, right?

A. Right.

Q. One dealt with warning labels and then there were two additional rules.

Now, by the time of the final rule on June 22nd, 1964, the FTC determined to withdraw the second and third rules, correct?

A. Not to adopt the proposed rules.

Q. Not to adopt those rules. And the basis for the FTCs decision was that it wanted to give the cigarette industry an opportunity to implement the provisions of the cigarette ad-

vertising code and, perhaps, make those rules unnecessary, correct?

A. There's not a direct reference here to the cigarette advertising code but there is a statement that the industry has indicated an intention of acting voluntarily to end undesirable practices in the areas covered by the proposed rules.

Q. And the Commission, therefore, determined not to adopt proposed Rules 2 and 3 or any similar provision at this time as formal trade regulation rules, correct?

A. That's correct.

Q. Okay. Now, vacating those two rules, though, was not the end of FTC activity with respect to tar and nicotine yield disclosures in advertising, was it?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. The story doesn't end there, does it?

MR. KLONTZ: Objection.

MR. SINGER: Objection, form.

You may answer.

A. I'm—I'm not sure exactly what you're asking but the Commission's been active in targeting advertising since then.

BY MR. WAGNER:

Q. Okay. In fact, even though Congress passed the Federal Cigarette Labeling and Advertising Act in 1965, in the FTC's view that did not change the FTC's authority to monitor and police unfair and deceptive acts and practices in advertising and marketing, right?

MR. KLONTZ: Objection.

A. I'd have to look at the statute. I know there's a complicated series of amendments that were designed to make

sure that except for the warnings specified by Congress that the FTC's authority remained intact I don't know the precise timing of those amendments, but ultimate—ultimately that is where the act ends up.

BY MR. WAGNER:

Q. Okay. And in order to move the ball forward with respect to tar and nicotine yield disclosures, by March of 1966, the FTC took the view that it was going to reverse its policy that had banned any disclosure of tar and nicotine yields, correct?

MR. KLONTZ: Objection.

A. Again, I'm going to, look at my statement

You know, in 1966, we took two steps to encourage comparative information about tar and nicotine yields.

BY MR. WAGNER:

Q. Right. Okay—

A. And one of those is ending the ban on tar and nicotine advertising.

Q. Right.

(Peeler Deposition Exhibit No. 16 was marked for identification.)

BY MR. WAGNER:

Q. I'm going to show you Peeler 16 which is a letter dated March 24th, 1966, sent from Joseph W. Shea, Secretary of the Federal Trade Commission, to Philip Morris, Inc., it has Bate stamp number 1005112588. I'll represent to you that identical letters were sent to all of the cigarette manufacturers and ask you if you've seen this document before?

A. I've seen—I've not seen this document before. I've seen the text of this document before.

Q. Okay.

A. And the person that signed the document is the secretary of the Commission who acts at the direction of the Commission.

MR. WAGNER: Is there something you needed to say?

MR. SINGER: I'm just showing the witness where this has been reproduced elsewhere.

MR. WAGNER: Correct.

MR. SINGER: The cigarette advertising guides were March 25th rather than March 24th, but I—the same text.

MR. WAGNER: Okay.

BY MR. WAGNER:

Q. Now, in the letter which was sent by the direction of the Commission, Mr. Shea says that advertising tar and nicotine yields will not be—would not be in violation of the guides or of any provisions of law administered by the Commission.

Do you see that language?

A. Uh-huh. Yes, I do.

Q. What did the Commission mean by a violation of the guides?

MR. SINGER: Again, I'm going to object to the extent it calls for speculation, but to the extent you know please feel free to testify.

A. I don't—I don't know what violation of the guides means because, you know, technically you can't violate a guide. It's not—it's not actionable to violate a guide. What's important is whether it's an unfair or deceptive act or practice under Section 5.

BY MR. WAGNER:

Q. Right.

A. The guides are designed to give guidance as to what would or not be an unfair or deceptive act or practice so I—my assumption is what they're saying here is an interpretation of the guides it would prohibit these claims.

Q. I see.

A. Would be inappropriate going forward.

Q. Let me ask you this: If the FTC believes that there has been a violation of the guides, can the FTC use that as evidence in an enforcement proceeding?

MR. KLONTZ: Objection.

A. I don't believe we can.

BY MR. WAGNER:

Q. Is there some prohibition on that?

MR. KLONTZ: Objection.

A. I'm not aware of any doctrine of law that would allow us to use it—there's nothing—there's no legal doctrine saying it's a prima facia case or a presumptive violation or anything like that I suspect that we could argue that it shows agency interpretation of its statute, but, you know, we would still have to prove the underlying—to win a case we'd still have to prove the underlying Section 5 application.

BY MR. WAGNER:

Q. Okay. This is referring, when it says to the guides, to the 1955 cigarette advertising guides, right?

A. I don't know what else it would be referring to.

Q. Well, that—that's referenced in the very first sentence of the letter, right?

A. Okay, you're right.

Q. Okay. And so—and in this letter the FTC is also disclosing its choice for a standardized test method, correct?

A. Yes, it is.

Q. Okay. And by this letter the FTC was informing Philip Morris and the other cigarette manufacturers of its policy from this point going forward, correct?

A. Yes.

Q. Okay. And the FTC also issued a press release announcing the policy, right?

A. Yes.

Q. Okay. And the policy of the FTC from this point going forward was to permit tar and nicotine yields to be disclosed in advertising in accordance with the chosen test method, right?

A. That's the effect of it. I mean, the legal basis for it is a determination that a claim limited to tar and nicotine content that's determined by this method would be considered to be a substantiated claim.

Q. Okay. And the FTC did not need a trade regulation rule in order to announce this policy, correct?

MR. KLONTZ: Objection.

A. Well, that's an interesting question.

BY MR. WAGNER:

Q. Okay. Did the FTC use a trade regulation rule to announce this new policy?

A. No, they didn't.

Q. Okay. But the policy was adopted after investigation, deliberation and consideration by the Commission, correct?

A. That's my understanding from conversations I had with Harold Pillsbury, yes.

Q. Okay. And this policy, the one articulated in Peeler 16 to permit factual statements of the tar and nicotine content expressed in milligrams of the mainstream smoke from a cigarette as long as they are substantiated by tests conducted in accordance with the Cambridge filter method adopted by the FTC, has been the FTC's policy in effect continuously since March 24th, 1966, correct?

A. Well, let me go back. I mean, there's another qualification there which says "no collateral representations (other than factual statements of tar and nicotine content of cigarettes)."—

Q. Okay.

A. —"are made, expressly or by implication, as to the reduction elimination of health hazards?"

Q. With that amendment?

A. With those two amendments, that continues—the Commission has not revoked that policy. The Commission has expressed on a number of occasions concerns about the adequacy of the test method and the communication of that to consumers.

Q. Okay, but the fact remains that the policy announced in this letter dated March 24th, 1966, has not been revoked, correct?

A. We have not revoked the Cambridge filter test method and we have not challenged tar and nicotine claims made under that—purely tar and nicotine claims made under that test method.

Q. Okay. And at the time the FTC determined to permit advertising containing representations regarding cigarette's average tar and nicotine yields. One goal of the FTC was to permit comparisons between brands, right?

MR. SINGER: Objection, comparisons between brands by consumers, by—

MR. WAGNER: Yes.

MR. SINGER: —advertising..

MR. WAGNER: By consumers. By consumers.

MR. KLONTZ: Objection.

A. The goal of specifying uniform test method was so that accurate comparisons between brands could be made.

BY MR. WAGNER:

Q. By consumers choosing among cigarettes, correct?

A. Well, I've never heard it phrased exactly that way so that accurate comparison could be made by—in advertising.

Q. Take a look at the Peeler 4, if you would for a second.

A. Okay. What page?

Q. It's the second day so I think you'll see a red—

MR. SINGER: Yes. There's a divider.

BY MR. WAGNER:

Q. Divider in there?

A. Okay.

Q. All right, take a look at Page 18 of the second day. This is December 6th, 1994.

MR. SINGER: What page, I'm sorry?

MR. WAGNER: 18.

MR. SINGER: Thank you.

A. Page 18?

BY MR. WAGNER:

Q. 18. About two-thirds of the way down the page Dr. De Bethizy, D-E, second word B-E-T-H-I-Z-Y, asks the

chairman, Dr. Freeman, whether you could clarify what the purpose of the FTC test method is and you responded.

Do you see that?

A. I do.

Q. And what was the first sentence of your response?

A. "So I would go back to the statement that I started with yesterday, and that is to say that the purpose of the FTC rankings when they were put together was to establish a comparative basis for consumers choosing among cigarettes."

Q. Okay. And, then, if you flip ahead to Page 22, we cover the topic again. The second paragraph, I believe, is you again, right?

A. Me again.

Q. And what is it you said on Page 22 in the first sentence?

A. "The FTC method as it was conceived and implemented was designed to provide consumers with comparative information about the relative tar and nicotine content of cigarettes."

Q. Now, those were your words, right?

A. Yes.

Q. And you intended to accurately and fairly state the history at that conference, right?

MR. KLONTZ: Objection.

A. I don't know what that question means.

BY MR. WAGNER:

Q. Well, I just mean that—

A. I didn't mean to mislead the conference.

Q. Well, sure, that's all I'm saying.

A. Okay.

Q. Part of your function at the conference was to give the conference participants a sense of the history of the FTC test method, correct?

A. Correct.

Q. And you had done some research before you spoke at the conference to make sure you had an understanding to the point where you felt comfortable discussing that topic, right?

A. Right.

Q. And, so, the statements that you made at this conference about the purpose of the FTC test method as it was conceived and implemented was your best view based upon the research you had done in your personal experience regarding the history of the test method, correct?

A. Right, and the only point of clarification I want to add is I think your original question was had the FTC said that. And, you know, just like anybody else I'm just one person, that's what my interpretation was. I think what you're asking me was had the FTC said that and I said I wasn't aware that the FTC—I wasn't aware of an FTC statement verbalizing it that way and there's a difference.

Q. Okay. Are you aware of anyone—of the FTC ever taking an official position contrary to the statements you articulated at the NCI Conference regarding the purposes of the FTC test method?

A. No.

Q. Okay. Now, in addition to ending—we can strike that And a second goal of the FTC in adopting the FTC test method was to encourage the development of a marketplace competition for lower tar and nicotine cigarettes as measured by the FTC test method, right?

A. That's my understanding.

Q. Okay. Now, when the FTC announced its new policy in March of 1966, the policy did not permit advertisements of tar and nicotine yields as is set forth in Peeler 16. The FTC also requested comment from interested individuals, right?

A. On the—on what?

Q. On—on the test method. On the proposed test method.

MR. SINGER: Are you talking, I'm sorry, about Exhibit 14 or 15?

MR. WAGNER: 16.

MR. SINGER: 16, okay, I'm sorry.

MR. WAGNER: Right.

BY MR. WAGNER:

Q. 16 is the announcement of the new policy and the identification of the Cambridge filter method as the FTC's choice for the standardized test method that it's going to follow.

A. Okay. Yeah, I don't know.

Q. Okay.

A. You know, someplace—sometime during this process there's a decision to not only use this test method, but to have the FTC use it. I don't know that—I'm not aware that we sought comment on this particular letter, it seems pretty final to me, but . . .

Q. Are you aware that the FTC held a public hearing on the test method in—on November 30th, 1966?

A. You know,—I'm not aware that they did that. I assumed that there are documents saying that they did and that that—if they did, there would be a document announcing it and that that document would say what they were doing.

Q. Okay. So you haven't had a chance to review any of the submissions by any interested parties regarding the FTC test method or the transcript of the hearing prior to this deposition, have you, or you have not done so?

A. The 19—

Q. The 1966—

A. No, I have not.

Q. The period leading up to the formal adoption of the test method.

A. No, I have not had an opportunity to do that.

Q. Okay. Are you aware generally that the FTC received technical memoranda regarding the smoking machine measurements from the tobacco companies?

A. No, I'm not.

Q. Okay. By July 31st, 1967, the FTC had made up its mind regarding a test method and the FTC directed its staff to conduct formal testing of cigarettes under specified conditions and reported that decision in the Federal Register, are you aware of that?

MR. KLONTZ: Objection.

MR. SINGER: Objection to form.

You may answer.

A. Yeah, the stuff that I'm aware of is the stuff that was in my written statement because that was pulled together for me and documented—

BY MR. WAGNER:

Q. Right.

A. —in advance of the NCI Conference. And, you know, by mid-1967 the laboratory was ready to begin testing

cigarettes for tar and nicotine yields and there's a Federal Register Notice on August 1st, 1967, announcing that.

Q. Okay, why don't we mark that and make sure we're all talking about the same thing, then. We'll mark as Peeler 17.

Thanks.

MR. SINGER: Thank you.

(Peeler Deposition Exhibit No. 17 was marked for identification.)

BY MR. WAGNER:

Q. The FTC notice or the Federal Register Notice dated Tuesday, August 1st, 1967.

A. Just cleaning up here for a minute.

Q. Sure.

A. Okay. Yeah, this is the notice referred to in my statement.

Q. Okay. And this notice contains directions to the staff of the Federal Trade Commission to commence testing cigarettes under the Cambridge filter method as modified by the Commission, right?

A. Yes.

Q. Okay. And the testing protocol that the FTC adopts ensures that cigarettes are tested exactly the same way, right?

MR. KLONTZ: Objection.

A. The purpose of the testing protocol is to be sure that if two different laboratories test the same brand of cigarettes that they would get essentially the same results.

BY MR. WAGNER:

Q. And the way that that would be accomplished is by standardizing the test protocol, right?

A. It's by both standardizing the test protocol and specifying a, you know, large enough sample of cigarettes so that the variations in the cigarettes are accounted for by the testing methodology.

Q. Okay. And under the testing protocol there will be an identical number of puffs per minute taken, correct, one puff per minute?

A. Yes.

Q. Okay. And under the testing protocol each puff will last two seconds, tight?

A. Yes.

Q. And every—the volume of each puff is going to be 35 millimeters per puff, right, that's what Dr. Pillsbury explained?

A. Yes.

Q. Okay. And there's going to be a standardized butt length for the cigarettes of 23 millimeters or the length of the filter plus a 3 milliliter overwrap, right?

A. Yes.

Q. Okay. And prior to testing, I don't know if this is in —spelled out in that notice, but Dr. Pillsbury talked about it in 1994, that all cigarettes are prepared or conditioned prior to testing.

Do you recall that?

A. Yes, cigarettes are prepared and conditioned. In fact, there's a publication that I think we handed out that was by Ogg on what the testing methodology—

Q. The Cambridge filter method is—

A. It's the longer description of the Cambridge filter method.

Q. Dr. Ogg is credited with creating the Cambridge filter method, right?

A. Yes.

Q. It's known sometimes as the Ogg method, right?

A. That's my understanding,

MR. WAGNER: That's O-G-G.

BY MR. WAGNER:

Q. And prior to testing, the cigarettes are prepared or conditioned by keeping them in storage at a specified temperature and humidity level for a minimum of 24 hours, right?

A. I'm not familiar with the details. I know that there is a storage and preparation process and presumably Harold Pillsbury's testimony talks about that.

(Peeler Deposition Exhibit No. 18 was marked for identification.)

BY MR. WAGNER:

Q. I'll show you Peeler 18 which are Dr. Pillsbury's written comments.

A. Yes, Harold Pillsbury says "Before being smoked, the cigarettes are 'conditioned,' by being placed on storage trays in a room maintained at 75 degrees Fahrenheit and 60 percent relative humidity for not less than 24 hours."

Q. And this is done to make sure that there are no variations in moisture contents, right?

A. It's—it's done—I'm not sure if it's just moisture content. It's made—it's done to make sure that, again, the results—if this test is done in different laboratories it would be comparable standardizing results.

Q. If the humidity were different, the test results could be different, correct?

A. Presumably.

Q. Okay. And so we don't have a different test for Washington, D.C. in the summer and California in the winter, we want to make sure that everything is the same nationally, right?

A. There's just one testing methodology.

Q. Okay. And the FTC does not perform different tests or report different test results for different states or different regions and has never done so, right?

A. I'm—I am not aware of the FTC ever doing any testing beyond the testing that's described in this protocol.

Q. Okay. The FTC, the parameters that we've discussed in the testing protocol, has retained all of these same parameters for testing tar and nicotine yields—tar and nicotine yields, not carbon monoxide, tar and nicotine yields since August 1st, 1967, correct?

A. My understanding is that there have been some slight changes and I'm not even that sure what they are, but the general test method and these parameters have been maintained.

Q. Okay. And the FTC itself did the testing for approximately 20 years, right?

A. Yes.

Q. Okay. And then the FTC closed its lab and responsibility for conducting the tests shifted to TITL, the Tobacco Institute Testing Lab, right?

A. Well, during the time the FTC had been doing the test the Tobacco Institute Testing Lab had also been doing the test and there had been collaboration between the two labs to ensure that the test results were the same. And the record over that period was that the test results were remarkably uniform and so we didn't see a need to retain our testing lab.

Q. There was no basis to believe that the test run by the Tobacco Institute Testing Lab were inaccurate, right?

A. The—

MR. SINGER: Objection to form. You may answer.

A. —experience was that the results of the FTC testing lab and the TITL testing lab were quite comparable.

BY MR. WAGNER:

Q. Okay. Now, I think you testified earlier that having the FTC run the testing lab is unusual.

A. Among government programs it seems very unusual to have an agency actually doing the testing for the industry.

Q. Okay. When it comes to, for example, energy efficiency rating, appliance manufacturers run their own tests, right?

A. Right. The normal course is the government would say this is the type of testing methodology we would like to see followed and the industry would do the test.

Q. And when the FTC has such a procedure in place it expects compliance with the testing method that it—that it has discussed with the affected industry, right?

A. Could you—

Q. Yeah.

Well, you said the usual course of business is for the industry to run its own tests, right?

A. Yes.

Q. Okay. And—well, let's just move on then.

Now, the FTC closed its lab so that the cigarette testing would then be done by TITL and they would submit their data to the FTC, right?

A. Yes.

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Okay. And the FTC took certain steps in order—

A. But can I go back?

Q. Sure.

A. TITL simply continued the testing that they had been doing before, it's not like they started testing only after we closed our lab.

Q. Understood.

And the FTC insisted on certain oversight provisions, correct?

MR. SINGER: Objection as to form. You may answer.

A. Well, it's a voluntary program and one of the—one of the things that happened when we closed—back a couple of steps. It's a voluntary program that's defined by an agreement among the tobacco companies. One of the things that happened—and that agreement was premised on the existence of an FTC test—testing facility so that when we abolished the FTC lab there had to be some changes made in the agreement, the voluntary agreement, to accommodate the fact that it was going to be TITL that was doing the testing and not the FTC. And as part of that review of that agreement, the industry agreed that Harold Pillsbury would have access on—at any time on an unannounced basis to inspect the testing procedures and that, I think, is incorporated in the voluntary agreement. It may also be evidenced by a separate letter.

Q. Okay.

A. So I'm not—I'm not positive about the second part.

Q. Okay. The ability of Dr. Pillsbury to have unrestricted access to the lab and to the data and to make unannounced visits and inspections was something that was important to the FTC, correct?

A. It was important to us. I think it was also important to the industry.

Q. Sure. And the FTC obtains all the data from TITL by compulsory process, right?

A. Yes. We—in fact, we had always had, but we would send 6B requests which are orders to file special reports to the Tobacco Institute Testing Lab and they would—no, I'm sorry, not to the tobacco and—to the cigarette manufacturers and they would provide us with the results of the Tobacco Institute Testing Lab testing.

Q. And the FTC also requires sworn verifications as to the accuracy of the data, right?

A. Yes, the responses to 6Bs are sworn.

Q. Okay. So just so we get where we are now in history. And we—the FTC has determined in March of 1966 to permit disclosure of cigarette's average tar and nicotine yields in advertising and marketing as long as they're based on an approved uniform method, right? That's one piece of the tar and nicotine program, right?

A. Again, though, the FTC's authority here is to prohibit unfair or deceptive or unsubstantiated claims and what the FTC did in '66 is to clarify that from that point on they would consider a testing that was done—claims that were based simply on tar and nicotine content, nothing else, based on testing done by uniform—by this uniform method would be substantiated claims that they would allow in advertising.

Q. Okay. And, then, in July of—or August 1st, 1967, the FTC determined to adopt a modified version of the Cambridge filter method by which all cigarettes would be tested? It's the second piece, correct? That's—

A. Okay. '66, right.

Q. '66 is when FTC announced the policy—

A. Well, in '66 we also announced that you should do it pursuant to Cambridge—

Q. I see.

A. —filter method.

Q. And on July 1st, 1967, the FTC actually directs the beginning of the testing to be done by the FTC?

A. By an FTC lab, right.

Q. By an FTC lab, right.

Now, the next part of the FTCs tar and nicotine program is that the FTC determines to publish the results of its testing. right?

A. We did publish the results of our testing. When do we make that decision?

Q. I think as you described in your speech there was a request by Senator Magnuson of the FTC to furnish Congress with its test results, right? If you look at, I think, Pages 12 to 13—or actually it's Page 13 of the December 5th transcript, there's a reference to that, and it's also in your written statement if you're looking at that. I think it's at Pages 4 to 5. You see at the very bottom of Page 4. I think you're looking at Peeler 8, is that right?

A. Yeah, I'm looking—and I—and I see it, I just—I don't have a temporal—I don't have dates—

Q. I see.

—on that so I don't know exactly when it occurred. I assume it occurred fairly recently after that. I think—but I don't know—I also don't know the date of our first tar and nicotine report, but that would be a matter of public record.

Q. Right. Well, the first tar and nicotine test reports were issued in November of 1967, right, does that sound about right to you?

A. You know, I would have to look at them, but—

Q. Okay.

—I wouldn't be surprised.

Q. Okay. And the FTC published those test results in the Federal Register, correct?

A. Again, I don't have independent knowledge of that but there should be a document showing that.

Q. Well, is it your understanding that that was the ordinary course of business for the FTC, that the test results were in fact published in the Federal Register?

A. No, I didn't know that.

Q. Okay.

A. Because by the time I got to the FTC I don't think we published them in the Federal Register.

Q. The FTC was publishing tar and nicotine reports—

A. Yes.

Q. —as a freestanding document?

A. Yes.

Q. Okay. And—and that's a process that has continued to today, right?

A. Yes.

Q. Okay. Now, you—you began to speak a little bit about voluntary agreement which I think is the next step in creating and defining the FTCs tar and nicotine program so let's go there.

We've got a—the policy as articulated in the March 24th, 1966, letter to permit publication of tar and nicotine yields pursuant to the method, right?

A. Right.

Q. And, then, we've got the adoption of the test method on August 1st, 1967, right?

A. Right.

Q. Okay. And we've got the FTC—publishing FTC test method results either in the Federal Register or in its tar and nicotine reports, correct?

A. Correct.

Q. The next step is that the FTC also made a determination that it wanted the cigarette manufacturers to publish FTC test method and results in their advertisements, correct?

MR. KLONTZ: Objection.

A. I don't have the temporal framework for this, but

BY MR. WAGNER:

Q. All right.

A. —my understanding is that at some point the FTC either proposed or discussed a trade regulation rule to require disclosure of tar and nicotine test results. That the industry responded to that by saying that they would come up with a voluntary agreement to do that themselves and the FTC withdrew the trade regulation rule and said—and I think there was also an announcement that the industry had entered into this agreement among themselves to publish the results.

Q. Okay. Well, let's take it a little bit step by step.

A. But I—and I—the documents are here somewhere.

Q. [illegible]hey are. We have no shortage of documents. You've already figured that out, right?

A. Yes.

Q. I'm pretty good with the documents. The FTC initiated the trade regulation rule making proceedings in order to require that the cigarette manufacturers would publish FTC test method tar and nicotine results in their advertising, right?

A. Proposed a trade regulation rule that would have required disclosure of tar and nicotine information in cigarette advertising and I think on labels, right? Or not?

Q. Let me see if I can get the proposed trade regulation rule.

Here it is. I think it's this one.

(Peeler Deposition Exhibit No. 19 was marked for identification.)

BY MR. WAGNER:

Q. I'll show you Peeler 19 which is the Proposed Rule Making by the Federal Trade Commission from August 8th, 1970, regarding advertising of cigarettes. It's published in the Federal Register on August 8th, 1970. It's Volume 35, Page 12671.

Is this the Federal Register Notice you were referring to?

A. Yes, it appears to be.

Q. Okay. Now, pursuant to the language of this notice, the FTC was announcing its determination that it would be an unfair or deceptive business practice within the meaning of Section 5 of the FTC Act for cigarette companies to fail to disclose clearly and prominently in all advertising the tar and nicotine content of the average—of the advertised cigarette in milligrams of tar and nicotine per cigarette based on the most recently published FTC test results, right?

A. Well, I mean, the—going back for a minute to the first point. This is a proposal, it's not a determination.

Q. Correct

A. And the commissioner proposes things to get public comments so it can make determinations.

And it would—but this proposal would require—would make it a violation of the Federal Trade Commission Act to fail to disclose clearly and prominently in all advertising the

tar and nicotine content of the advertised variety or—varieties and milligrams of tar.

Q. Based on—

A. Per cigarette based on the most recent published FTC test method results. Okay?

Q. Okay. Now, you said this isn't the final determination because there wasn't—this isn't in the form of a final rule, it's a proposed rule. Would the FTC propose a rule unless it had come to some sort of a decision that the proposed rule was in the public interest?

MR. SINGER: Objection to the extent it calls for speculation. To the extent you know this, you may answer.

MR. KLONTZ: Objection.

A. You know, again, it would require me to speculate. We proposed rules and don't go forward with them based on what we hear in the comment period.

BY MR. WAGNER:

Q. All right. You may learn something during the course of the comment period that could change the FTCs mind, that's always possible, right?

A. Right.

Q. But does the FTC generally or with—specifically with respect to this particular rule does it make a proposed rule without first studying and analyzing the issue?

MR. SINGER: Objection.

You may answer.

A. The Commission in proposing a rule would obviously review evidence and consider staffs arguments both for and against a rule and make a determination about whether they believed it was correct to go ahead with the publication of a proposed rule.

BY MR. WAGNER:

Q. That's what I thought. And what the FTC is seeking should—through this rule is industry-wide compliance, right?

MR. KLONTZ: Objection.

MR. SINGER: Objection.

A. Rules are promulgated to define with specificity and facilitate industry-wide compliance.

BY MR. WAGNER:

Q. Okay. And I think as we've discussed even back at the beginning of the deposition, rule making is only one means by which the FTC can obtain industry-wide compliance, there are other vehicles that the FTC can use, right?

A. That's correct.

Q. Okay. And for this particular matter another vehicle for the FTC to obtain industry compliance appeared in the form of an industry-wide agreement, right?

MR. KLONTZ: Objection.

A. That's—you know, my understanding is we propose the rule, there was a proposal for the industry for voluntary —to voluntarily adopt this pursuant to an agreement among the manufacturers and the FTC withdrew the rule.

BY MR. WAGNER:

Q. Okay. Is obtaining industry-wide compliance versus —not versus, via voluntary agreements something unique to the cigarette industry or is it something that the FTC also obtains in other industries?

A. The Commission has a number of programs designed to encourage, you know, voluntary compliance in a whole variety of industries.

Q. Okay. Is there anything nefarious about the FTC obtaining an industry-wide agreement in lieu of a formal rule?

MR. KLONTZ: Objection.

MR. SINGER: Object to form.

You may answer.

A. The—the idea of proceeding on a voluntary basis is something the Commission has done in a variety of circumstances with a variety of industries and the Commission looks at these programs to try to make sure that they are done, you know, correctly and in the public interest.

* * *

[Page 278, line 4 through Page 289, line 25]

Q. The third full paragraph on Page 2.

A. Okay.

Q. Right? Do you see that?

A. Okay.

Q. That's the quote from the article written by Dr. Pillsbury that we already referred to earlier in the deposition, right?

A. Right.

Q. Okay. Then in the next paragraph Lorillard calls the Commission's attention to a specific technological advance.

Do you see that?

A. I do.

Q. Okay. And what is the specific technological advance to which Lorillard is referring?

A. Development of air dilution systems that do not employ visible air vent holes.

Q. Right. Lorillard is calling the Commission's specific attention to the development of invisible vent holes, right?

A. Yes.

Q. Okay. So—and Lorillard is a tobacco company. It's a tobacco company that was bringing the FTC's attention to bear on the development of invisible vent holes, right?

MR. KLONTZ: Objection to this question and the last one, too.

A. Lorillard has asked the Commission to modify its test methodology to accommodate that technology, yes.

BY MR. WAGNER:

Q. By "that technology" you mean invisible vent holes, right?

MR. KLONTZ: Objection.

MR. SINGER: Objection.

A. Well, it says not visible, "do not employ visible air vent holes," so, I assume they're invisible.

BY MR. WAGNER:

Q. Okay. Now, the FTC staff considered all of the comments that they received, right?

A. Yes, they would have considered the comments they received.

Q. Okay. And in the end the FTC determined to keep the FTC test method as is for tar and nicotine testing, correct, there was no change in the insertion depth?

A. I believe that's the result.

Q. Okay. We'll now mark the March 22nd, 1978 Federal Register Notice which I think we've referred to.

(Off the record.)

(Peeler Deposition Exhibit No. 35 was marked for identification.)

BY MR. WAGNER:

Q. Peeler 35. It's a Federal Register Notice dated March 22nd, 1978. It's published in Volume 43 of the Federal Register at Pages 11856 and 11857.

Is this the Federal Register Notice you were referring to a few minutes ago?

A. This was the one I saw, yes.

Q. Okay. Now, in this Federal Register Notice, the Commission reviews a little bit of the history of the FTC test method, right?

A. Yes, they do.

Q. And they expressly reassert the original intent of the FTC test method citing the August 1st, 1967, press release, right?

A. They don't cite it, but they say when they—they refer to July 13th, 1967, made the following statement.

Q. Okay. And in that statement they are reasserting that the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker but, rather, to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method, right?

A. That's right.

Q. Okay. So the Commission is reemphasizing that machine smoking does not mimic or equate to human smoking, right?

A. That's correct.

Q. Okay. However, according to what the Commission is saying in this Federal Register Notice, if you assume that consumers smoke cigarettes in the same way they will, in fact, inhale tar and nicotine yields that are proportional to the FTC test method results, right?

MR. SINGER: Can you repeat the question, please?

MR. WAGNER: Sure.

BY MR. WAGNER:

Q. If one assumes that consumers smoke different cigarettes in the same way then they will inhale tar and nicotine in amounts that are proportional to the relative values that the FTC figures, that is what the FTC is emphasizing, right, or one of the points of emphasis?

A. It's—I mean, it's explaining that that's the way that current test methodology works, that only if a consumer smoked each cigarette in the same way.

Q. And in that way the FTC test method has value, right?

MR. SINGER: Objection. Pardon me.

MR. KLONTZ: Objection.

A. I don't think that they're trying to describe the value of the system here. They're just trying to describe how it works. And the point of it is to—the point of it again is to provide a uniform metric to encourage competition that would result in overall declines in tar, in machine tested tar nicotine content.

BY MR. WAGNER:

Q. Okay. And another goal is to provide consumers with a standardized base of information from which they can choose between cigarettes, correct?

A. Well, again, you know, that's the discussion we had before, but that's one way of—that's a way that I have expressed it in the past. I'm not sure that the Commission has done that. The goal of all this is to increase consumers' health and that's the issue that's being debated.

Q. And the FTC explains in this Federal Register Notice that the relationship that they are talking about, the propor-

tional values won't hold, yet consumers or smokers are covering some or all of the vent holes during smoking, right, the relationship gets complicated?

MR. SINGER: Objection.

You may answer.

MR. KLONTZ: Objection.

A. I'm—that's the point made in the next paragraph.

BY MR. WAGNER:

Q. Okay.

A. That if you cover the holes you get more than the FTC machine would.

Q. So the FTC was aware of that relationship by 1978, March of 1978, when it issued this release, right?

MR. KLONTZ: Objection.

A. Again, this release is on that date and talks about that issue.

BY MR. WAGNER:

Q. Okay. You see at the bottom of the middle paragraph, it says, "The Commission's staff followed up with a May 10th, 1977, letter soliciting comments," and "That letter was sent to the 78 persons on a staff-maintained cigarette mailing list"?

A. I do.

Q. Okay. And two paragraphs down you see, it says, "Comments were received from one government official"?

A. Yes.

Q. Okay. And if you flip the page, the second full paragraph on the left-hand column discusses continuity—historical continuity of test results, right?

MR. KLONTZ: Objection.

A. What paragraph are we on?

BY MR. WAGNER:

Q. The second full paragraph, it begins, "The Commission shares the concern expressed."

A. Okay. Well, what they're saying is two things. It's the concern expressed that a change would cause a lack of continuity and has determined not to make any changes in the absence of information indicating that a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use.

Q. So historical continuity of test results is something that was at least at this point important to the FTC, correct?

MR. KLONTZ: Objection.

MR. SINGER: Object to form.

You may answer.

A. Historical continuity of test results was a value and it was balanced with the lack of information about this proposed change being more consistent with the way that smokers actually use cigarettes.

BY MR. WAGNER:

Q. Okay. We're done with that episode.

At the NCI Conference in 1994, you describe a—a second occasion that focused the Commission's attention on the FTC testing protocol and this was the Barclay investigation, right?

A. That's right.

Q. Okay. The FTC began investigating advertising and marketing for Barclay cigarettes beginning in 1981, correct?

A. I don't have a date of opening. It says in the early '80s. And it says that we received the complaint in 1981.

Sometimes we're investigating before we receive complaints and sometimes we're not.

Q. Okay. Let's get the—the idea of what the investigation was about and then we'll delve into the documents.

Brown & Williamson marketed Barclay cigarettes?

A. Right.

Q. Right, we're aware of that.

And as we've seen with the insertion depth and investigation and as we talked about many cigarettes had ventilation systems that used perforated holes around the filter, right?

A. That's correct.

Q. Okay. The Barclay cigarette, though, had a different ventilation system, right?

A. That's correct

Q. Instead of holes circling the filter, the Barclay cigarette had four channels or grooves naming alongside the filter, correct?

A. That's my, understanding.

Q. Okay. And the principle was that instead of air coming in through the holes and mixing with the smoke that, as it does in with perforations, that air would flow through the channels and air and smoke would mix in the smoker's mouth and that's how the dilution would take place, right?

A. That is my understanding.

Q. The problem, though, was that when Barclay cigarettes were tested under the FTC test method procedure, the cigarette was inserted into the holder—into the holder, the channels stayed open, air would mix with the smoke and the cigarettes yielded an average of 1 milligram of tar, right?

MR. KLONTZ: Objection

BY MR. WAGNER:

Q. Well, that wasn't the problem, but—

A. That wasn't the problem. That's what—

Q. That's what happened?

A. —factually—that's factually what would happen in the FTC test method.

Q. Perfect.

However, when a smoker placed the Barclay cigarette in his or her mouth the grooves invariably collapsed?

A. That was our allegation.

Q. Okay. And when the grooves collapsed this prevented air from mixing with the smoke so that the smoker would actually receive a much different tar yield, right?

A. That was our allegations, right.

Q. Okay. And cigarette companies complained to the FTC about this, right?

A. Yes.

Q. Okay.

A. Competitors complained.

Q. Competitors complained the thought it was unfair, right?

A. I think they thought it was deceptive.

Q. Deceptive. Cigarette companies complaining about each other is hardly the stuff of conspiracies, is it?

MR. KLONTZ: Objection.

MR. SINGER: Objection. It calls for a legal conclusion. You don't have to answer that.

MR. WAGNER: Don't bother then.

MR. WILLIAMS: It was just too good not to pass up.

MR. KLONTZ: You should have waited until 5:15, I might have been asleep enough and it would have gone right by me.

MR. SINGER: I'll tell you at 7:15 we'd agree to anything.

* * *

[Page 358, line 1 through Page 369, line 8]

Q. And the FTC is aware that there were Public Health Service commercials that have echoed that same theme, correct?

A. I am not personally aware of that—

Q. Okay.

A. And I also would—I assume this is in a 1970s time frame, is that—

Q. '70s '80s, into the 1980s.

A. I'm not—I'm not personally aware of Public Health Service commercials saying that if you can't smoke you should switch—if you can't stop smoking, you should switch to low tar. I am aware of a number of commercials warning people about compensatory behavior.

Q. Okay.

A. Compensatory smoking behavior.

Q. Do you recall when those commercials were aired?

A. No, I don't. I haven't seen them on broadcast, I've seen them on tapes.

Q. Oh, I see, okay.

A. Of public service announcements.

Q. Do you recall television ads with James Earl Jones narrating them saying "There's bad and there's worse, write

for our listings, know the tar and nicotine content of your cigarette," do you recall those? Does that jog your memory? Not at all, huh?

A. No. When?

Q. I think those were in the late 1970s.

A. Okay.

Q. Okay. People can also get information regarding their cigarette choices from their doctors, right?

A. Yes.

Q. And people can get information regarding their cigarette choices from family members and friends, right?

A. Yes.

Q. And people can get information regarding their cigarette choices from teachers and coaches, right?

A. Sure.

Q. Okay. Now, with all of these sources of information, are you aware of any study, any study whether conducted by the FTC or not, that attempts to identify as a percentage or in any other way the number of low tar or light smokers who have chosen those cigarettes based on something that the tobacco company said as opposed to these other sources of information?

MR. KLONTZ: Objection.

A. I don't know how you would do that and I don't know why you would do that. The reach of mass media advertising is so far beyond the—those other forms of—of information distribution that I think you can assume that some of what consumers get is from mass media advertising. And, you know, if there's mass media advertising as playing on other, you know, preexisting beliefs or, exploiting preexisting beliefs it would still be under the Federal Trade Commission Act actionable, so—

BY MR. WAGNER:

Q. Okay.

A. —I'm not sure why you would do those studies.

Q. To your knowledge, the FTC has not done such studies, have they?

A. Trying to segment out—

Q. Right.

A. —what comes from where?

To my knowledge, we haven't and it seems like it would be very complex to try to do.

Q. Has the FTC undertaken a test to determine whether or not smokers of low tar and light cigarettes would quit if they were told about compensatory smoking behavior?

A. There have been studies that have looked at how low tar and ultra low tar cigarettes affect or potentially affect quitting behavior, but I'm not aware of any that have addressed it and this doesn't mean that there aren't, but I'm not —I'm not personally aware of any that addressed it the same way that you're talking about. And it would depend—I mean, this is really sort of a disclosure issue. It would depend on the methods is one of the things we found in our disclosure studies is that if you have two messages that seem contradictory, it's very hard for consumers to reconcile them. So—

Q. Let me ask you the question this way.

A. I'm not sure how you would do it.

Q. Okay. Let me ask you the question this way: Are you aware of any studies in which the—the FTC has tried to determine whether the existence of lights and low tar cigarettes either causes people to start smoking or causes people to not quit smoking?

A. That's an issue that the FTC is obviously interested in. I'm aware of at least one internal staff analysis of that.

Q. Was that done by Joe Mulholland?

A. Yes.

Q. Okay.

A. There were other analysis of that that have been done by other people.

Q. At the FTC?

A. Not at the FTC but outside the FTC.

MR. WAGNER: Okay. I got diverted on these comments. Let me see, because I probably only have five minutes left. I bet I can finish Barclay, right?

THE WITNESS: If you want some of John's time, you're welcome.

MR. WAGNER: I still get some time.

MR. SINGER: Take it all.

MR. WAGNER: No, no, no.

BY MR. WAGNER:

Q. The FTC had a second post Barclay proceeding that began in October of 1985, do you recall that?

A. Yes.

Q. Okay. And in that proceeding the FTC came up with a proposed alternative that included a screening process to attempt to first screen out cigarettes that were subject to compensatory smoking behavior, right?

A. I'd have to look at the verbiage to know that that sounds right.

Q. And we'll fish that out, but just let's see if I can get this done by memory, maybe it will be faster.

For those cigarettes that were subject to the problem, the FTC forwarded the idea that actually two alternative testing regimes for people to consider during this proceeding. One would be to test the cigarettes under an alternative test method; and the second would be to subject them to a two-tier test, the current FTC test method, and then one with all the vent holes taped shut.

Does that sound right with your memory?

A. I know that's one of the approaches we floated at one point. I guess, I would need to see the Federal Register Notice to make sure.

Q. Okay. After—the FTC received comments after it initiated this notice and comment period, correct?

A. Yes.

Q. Okay. And after having received all the comments and after having considered all the comments and deliberating upon them the FTC made no change to the test method, correct?

A. That's correct.

Q. The FTC reported in its tar and nicotine reports that although there have been several adaptations offered for the testing methodology none have proven to be satisfactory, correct?

A. Again, I would have to look at the language, but that sounds correct.

Q. I think as you put it in your comments to the NCI Conference in 1994, there was no clear consensus as to what to do with the FTC test method, if anything, correct?

A. That would be what I said to NCI.

Q. Okay. And there was another point that you made, right, that it would be premature to abandon the FTC testing

system since the epidemiological evidence indicated a population benefit from shifting to low tar cigarettes, correct?

MR. KLONTZ: Objection.

BY MR. WAGNER:

Q. Do you have Peeler 8 in front of you?

A. Yep.

Q. The paragraph that begins "In short"?

A. On page?

Q. 13.

A. What I—what I said was "since then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950s," citing the 1981 Surgeon General's report.

Q. Okay. And based upon the then-current epidemiological evidence, you were stating that it would be premature to abandon the testing system, correct?

A. Yes.

Q. And if the epidemiological evidence indicates that there is a population benefit to low tar cigarettes, then, the FTC test method has value and that might call for its retention, correct?

MR. KLONTZ: Objection.

A. Could you—could you restate that?

BY MR. WAGNER:

Q. Sure.

If the epidemiological evidence suggests a population benefit, such as reduction in lung cancer deaths attributable to the decline in the average tar levels, that would be a reason to retain the FTC test method, right?

A. Well, that was certainly what we decided at that point in time and that is also the question that we have now posed to the public health agencies for an answer.

Q. That's the question that I think you testified at the very beginning of today that's still open, right, you have not come to a final determination yet?

A. Yes, we've asked—we have—the agency has decided that it's not the right place to answer that question and has asked the Public Health Service to answer that question for us. Public health agencies to answer that question for us.

Q. Okay. And, so, the FTC has not come to a final determination then yet on what to do, if anything, about the FTC test method, whether to keep it, abandon it, or revise it?

A. That's correct.

MR. WAGNER: Why don't we break for the day, then.

Thank you for all of your cooperation. I know it was a lot of documents. And we'll see you in the morning.

THE WITNESS: Wish I had been there in the 1960s.

VIDEO TECHNICIAN: Time is 5:49:39. We're going off the record. This is the end of Tape No. 4 and the end of the testimony for July 30th, 2002.

* * *

[Page 455, line 5 through Page 482, line 25]

Q. Okay. The FTC had an instance where it had to specifically deal with the issue of describing those cigarettes as low or lower in an enforcement action with American Tobacco Company, right?

A. I don't know.

Q. This is one of the actions you were talking about that the early 1970s—

A. Right.

Q. —there was an action with American Tobacco Company—

A. I know—I know that there was an action—I know it involved

Q. I'm sorry, we talked on each other.

A. I know that there was an action, I know it involved tar and nicotine, I know that the order contained mandatory provisions on tar and nicotine unlike the voluntary—the rest of the voluntary program. I don't know what the specific—I've not studied the specific allegations of the case.

Q. Okay.

(Off the record.)

(Peeler Deposition Exhibit Nos. 56 and 57 were marked for identification.)

BY MR. WAGNER:

Q. Well, I marked as Peeler 56 a copy of the complaint in Docket No. 8799 in the matter of The American Tobacco Company. And Peeler 57 will be the decision and the order in that same case.

I'm also going to mark as Peeler 58 an FTC press release dated May 22nd, 1969, that deals with the same issue.

A. Okay.

(Peeler Deposition Exhibit No. 58 was marked for identification.)

BY MR. WAGNER:

Q. Okay. Now, the complaint that was issued in the American Brands matter in 1971 involved advertising of two varieties, of Pall Mall 100's and also Lucky Filters, right?

A. I went through the legal pleadings, not the facts, so let me look.

Q. In Paragraph 2 of the complaint it refers to Pall Mall Gold 100's, Pall Mall Menthol 100's and Lucky Filters.

A. Okay.

Q. Okay. In Paragraph 4 of the Complaint the Commission specifically references affirmative statements and misrepresentations or—I apologize—in Paragraph 4 of the complaint the FTC specifically calls out numerous statements and representations as well as certain failures to disclose, right? The failures to disclose are referenced on Page 3 in the first full paragraph.

A. I wouldn't say they're numerous, but they're typical of the representations.

Q. Well, in the fourth line of Paragraph 4 doesn't the Commission refer to "numerous statements and representations"?

A. It refers to numerous statements, but the ones that set out are the typical illustrative ones.

Q. And the Commission also is basing its complaint on certain failures to disclose facts, right?

A. Appears to be.

Q. Okay. And both of those are within the FTC scope of regulatory activities, right, the power to prevent or punish both affirmative misrepresentations and omissions, correct?

A. Yes.

Q. Okay. And the gravamen of the complaint was that American Brands was making low tar and lower tar claims including comparative claims that were not substantiated, right?

A. That's correct.

Q. In fact, the complaint identifies, I think, that the cigarettes at issue had FTC test method results of 20 and 21 milligrams of tar in Paragraph 4, correct?

A. That's what it says.

Q. Okay. And that is—both of those results are higher than the comparatively low yield figure of 15 milligrams of tar that was referenced in the 1968 annual report to Congress, right?

A. Well, I mean—I mean, what the Commission is saying here and this is—this is the same legal analysis that you would bring to a comparative claim now, is that, you know, given what the market was at that point and given where these cigarettes fell in the market at that point, that an implied claim to a consumer that these cigarettes were lower in tar than other cigarettes was deceptive and the relief is designed to correct that by requiring disclosures.

Q. I agree with all of that. The simple question, though, is just 20 and 21 milligrams of tar are higher than 15, aren't they?

A. The answer to that is 20 and 21 are higher than 15, but I'm not sure I see what the relevance of it is to this particular complaint.

Q. The pluses you indicate, the range on the tar yields on the market went from 4 milligrams of tar to 36 milligrams and the particular brands at issue came in at 56th and 77th out of 122 brands tested, right?

A. That's what it says.

Q. Okay. Now, the FTC ultimately resolved this complaint with a consent order, right, that's Peeler 57?

A. That's correct.

Q. Okay. Now, the FTC did not bar or prohibit American Brands from using words such as "low, lower, reduced or like qualified terms" in its cigarette advertising, did it?

A. No, it imposed affirmative disclosure requirements on them.

Q. Right. Instead of prohibiting those terms the FTC permitted the use of those terms as long as they met certain conditions, right?

MR. KLONTZ: Objection.

A. Well, what this order does is not—this order doesn't affirmatively permit anything. What this order does is say what you can't do and it says you can't use any of these terms unless you provide a disclosure of the tar and nicotine content in the smoke produced by the advertised cigarette and if the tar content of the advertised brand is compared to that of another brand or brands of cigarettes the tar and nicotine content of—the milligrams of the smoke produced by that brand or those brands and the tar and nicotine content and milligrams of the lowest yield domestic cigarette.

BY MR. WAGNER:

Q. Okay. And if you meet those conditions, then the use of terms such as "low, lower, reduced or like qualifying terms" are not prohibited, right?

A. They're not prohibited by this order.

Q. Okay. And there's one additional aspect to the order, right, that the FTC is referring to the tar—there must be a clear and conspicuous disclosure of the tar and nicotine content in milligrams of the smoke produced by the advertised cigarette, correct, that's Condition No. 1?

A. That's correct.

Q. And the Commission defines exactly what it means by tar and nicotine content in milligrams in Section 2 of the order, right?

A. That's correct.

Q. And the FTC specifically directs that when tar and nicotine disclosures are made in milligrams it means the total particulate matter, for example, with tar, the total particulate matter in the mainstream smoke of a cigarette as determined

by the testing method employed by the Federal Trade Commission, right?

A. That's what it says.

Q. And the same thing is true for nicotine as well, right?

A. That's what it says.

Q. Okay. So the conditions on using the words "low, lower, reduced or like qualified terms" are that they must be accompanied by a statement of the tar and nicotine content in milligrams as determined by the FTC test method, right?

A. For American Tobacco Company.

Q. For American Tobacco Company, that's what this order does, that's how it resolves the case, right?

A. That's right.

Q. Okay. And the FTC did not keep this complaint and consent order private, did it?

A. No.

Q. The FTC, in fact, published it on the public record to seek comment, right?

A. I assume it did. That's the normal process.

Q. Okay. And by—

A. This is—we only have the final. There's usually an interim—

Q. Okay.

A. —agreement that's published for comment. And then the order is issued after the agreement. This says —huh.

Q. Why does the FTC publish its orders, its consent orders?

A. Can I just read the first page here?

Q. Sure.

A. Well, it's interesting, this decision and order doesn't seem to say that it was published for public comment. It normally—if it was published for public comment there's a recitation of that in the decision and order. So, you know, our current rules are settlements, administrative settlements are published for comment, but I—I don't see any indication that this was.

Q. Well, you'll have to take my representation on that. I just—

A. Okay.

Q. —took the exact order on that and it was published —and it is published in the FTC reporter, correct?

A. Okay, to go back for a minute.

Q. Yeah.

A. The process we use now is if there is an administrative settlement it's published for comment but that's only if it's a settlement. If there's a litigated settlement, they're not published for comment.

Q. Why does the FTC publish consent orders?

A. We published consent orders and other final agency actions for a whole variety of reasons, one of which is that the Administrative Procedure Act requires you to do that.

Q. Okay.

A. The other is that one of the purposes of bringing cases is to give guidance to other industry members about what type of conduct we would challenge. The one thing that is confusing sometimes to people is that an order contains—often contains provisions that are designed to fence-in conduct so that they don't necessarily—they're not necessarily—it's the complaint that states the violation of the laws and it's the—the order is a remedial provision.

Q. Okay. I want to focus on the phrase you used "to give the industry guidance." Is there any question in your mind that the publication of the decision and order in the matter of American Brands was intended to guide the industry regarding anyone's, any industry actor's use of the words "low, lower, reduced or like qualifying terms" in cigarette advertising?

A. It would be designed to do that, it would be designed to do that in the context of the ads that are challenged.

Q. Okay. And the consent order evidences the FTC's determinations regarding, among other things, the public interest made after careful study and deliberation, right?

MR. SINGER: Objection to form.

You may answer.

A. The Commission is quite deliberative about its actions.

BY MR. WAGNER:

Q. Okay.

A. The only thing I don't know about this case and maybe you do is whether this is all conduct that precedes the '67 and '70 agreement or whether this is conduct that takes place after that. And there's no—there's no—I don't—

Q. That doesn't appear on the face—

A. —allege the dates that the conduct took place on.

Q. Okay. Let's move to the next subject

In 1976, Lorillard reformulated its True king size cigarettes and sought a reformulation test to obtain current—to obtain current tar and nicotine yield information for its advertisements.

Are you familiar with this episode in FTC history?

A. No.

Q. Okay. The FTC's test method numbers differed from Lorillard's leading to an exchange and you're familiar that there is a provision in the voluntary agreement for the companies and the FTC to engage in a process when there are such differences in order to reconcile those differences, right?

MR. KLONTZ: Objection.

A. I know—I know that there are provisions in the agreement that address that and also address new cigarettes and a number of other things. I don't remember exactly what those provisions are, but that sounds right

BY MR. WAGNER:

Q. Okay. At some point during that exchange the FTC came to the—to believe that Lorillard had requested an advisory opinion of the FTC.

Now, advisory opinions is one of the vehicles or mechanisms we discussed yesterday that the FTC has available to it in order to provide industry guidance, right?

A. That's correct.

Q. Okay. Are—are advisory opinions something that are entered often?

A. They are very unusual.

Q. Very unusual.

A. Although, the extent of the—well, I—let me qualify that They have been very unusual while I've been at the FTC. They're—as we discussed before, the mix of vehicles the FTC uses varies over time.

(Peeler Deposition Exhibit No. 59 was marked for identification.)

BY MR. WAGNER:

Q. Okay. I am handing you Peeler 59 which is a printout of an "Advisory Opinion" dated September 26th, 1978. It's published at 92 F.T.C. 1035.

Have you seen this advisory opinion before?

A. No, I haven't.

Q. Okay. On its face this opinion—this advisory opinion is in response to a request for an advisory opinion "as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number."

Do you see that?

A. I'm just reading it.

Q. Okay.

A. Do you have the incoming letter?

Q. No, sir.

A. No, okay.

MR. KLONTZ: Doesn't it say there was one?

MR. SINGER: I think it was just a phone call to a Commission attorney.

THE WITNESS: I'm sorry?

MR. SINGER: I think it says it was just a phone call to a Commission attorney.

BY MR. WAGNER:

Q. It says in the second sentence that it was transmitted orally.

A. Well, they—

Q. Another unusual moment in FTC history.

A. They used advisory opinions more loosely than is true now.

Okay.

Q. Okay. You've had a chance to read Peeler 59?

A. I did.

Q. Okay. Lorillard is requesting or has apparently requested an advisory opinion from the FTC to publish tar yield numbers that are higher than the latest FTC test method results, correct?

A. That's correct.

Q. And the Federal Trade Commission, in the advisory opinion refers to the 1971 voluntary agreement as creating an obligation to publish FTC test method results, correct?

A. I think what it's saying is that as a result of the voluntary agreement that the publication of a different number might be deceptive to consumers or would be deceptive to consumers.

Q. Correct. It states Lorillard's proposal would deviate from the voluntary agreement, right?

A. It's stating the Commission's view that it would be deceptive to publish a number that deviates from the voluntary agreement which seems to be reasoning that's similar to that only adopted by the court in—in the Brown & Williamson/Barclay matter.

Q. Okay. And the conclusion is pretty straight forward, isn't it, "in the Commission's opinion, tar values which are set forth in the cigarette advertisements must be consistent with the latest applicable FTC tar number," right?

A. I'm looking for that exact language, but—

Q. It's the last sentence.

A. Okay. Well, I think it's—that's the conclusion, it's qualified by the paragraph up above which is that the Commission believes it would be deceptive to advertise a different number and especially to label it as by FTC method when it's not.

Q. Right. And that remains true whether the different number would be higher or lower than the FTC test method number, right?

MR. KLONTZ: Objection.

A. That's the position taken by this advisory opinion.

BY MR. WAGNER:

Q. Okay. Now, this advisory opinion is also one of the vehicles by which the FTC can indicate to the industry the type of conduct by which it can remain in compliance with FTC policies, right?

A. Yes.

Q. Okay. Now, there's one more element to low and low tar descriptors. We've seen that from the American Brands decision, the guidance is that descriptors such as "low, lower, reduced or like qualified terms," are not prohibited if they meet the conditions set forth in that order, right?

A. The principle of American Brands, as I read it, is that if you make a claim that your product is low or lower and consumers imply from that a comparison to other cigarettes that unless your cigarette is at the low end of the FTCs testings—testing numbers—well, it doesn't say that, it says if it's in the middle of the FTC's testing numbers or at the high end of the FTC's testing numbers that that would be deceptive.

And the descending statement says—I think they're just talking about their own brand, that they've lowered the tar and nicotine content of their own brand and the majority saying "we see a comparative claim here of all cigarettes." So

that's what the K stands for. The remedy in the case is to say whenever you use one of those terms you've got to give information necessary to allow consumers to understand what you're saying. So the effect of that remedy would be to make clear that the claim is only about your cigarette and it's not a claim about should—the fact that remedy should be to make clear that your claim is only about your cigarette and not a comparative claim to other cigarettes.

Q. Okay. One of the requirements when a claim such as "low, lower, reduced or like qualifying term" is used is that the tar and nicotine content in milligrams pursuant to FTC test method be disclosed, correct?

A. Correct. And then to make sure that there's no mis—it appears to make sure that there's no misapprehension that it's also lower or low. On an absolute basis, you include a disclosure of here's what the low end of the market looks like.

Q. Okay.

A. And the low end of the market would be whatever the lowest is based on the most recent FTC test—

Q. Okay.

A. —as I—as I read the order.

Q. The order says if there is a direct comparison with other cigarettes you need to disclose the tar and milligram—the tar and nicotine content in milligrams of whatever cigarette you're comparing it to by using those FTC test method results as well, right?

A. Yeah, whatever one you're—and also the—are there two or three?

Yeah, if you're comparing it to a specific brand, the tar and nicotine content of the specific brand, but also the tar and nicotine content of the lowest yield domestic cigarette.

Q. Okay. So under the American Brands decision, one element, just one of the elements, is if you're going to use words like "low, lower, reduced or like qualifying terms," you must disclose the tar and nicotine content in milligrams of the cigarettes you're advertising using FTC test method results, correct?

A. That's correct.

Q. Okay. And in the Lorillard advisory opinion we see the FTC giving guidance that says "and only FTC test method results may be used, do not use any other test method results," correct?

A. Well, in the context of an ad where it's going to say by FTC method.

Q. Right.

A. And if you say by FTC method, I mean, again, that goes back to the Brown & Williamson.

Q. I understand.

That comes a little bit later, but as long as you're going to say by FTC test method, which is part of the voluntary agreement, and you're going to use only FTC test method numbers, right?

A. Right.

MR. WAGNER:

Okay. Now, we have to change the tape, then I get to the next element.

THE WITNESS: Okay.

VIDEO TECHNICIAN: The time is 11:18:20. We're going off the record. This is the end of Tape No. 5. We move on to Tape No. 6.

(Recess taken.)

VIDEO TECHNICIAN: Time is 11:25:59. This is the beginning of Tape No. 6 and we're back on the record.

BY MR. WAGNER:

Q. Okay. Back when the FTC adopted the FTC test method in 1967 it announced that a machine-based testing system does not and was not intended to approximate, mimic or predict actual human intake of tar and nicotine when smoking, right?

A. That's correct.

Q. Okay. And at the conclusion of the inquiry or proceeding relating to the insertion depth of cigarettes that we talked about yesterday, the FTC reiterated that concept in its Federal Register Notice in 1978?

A. That is correct.

Q. Okay. Now, in 1993 and 1994, though, American Tobacco Company was advertising its Carlton cigarettes and those cigarettes were rated as yielding 1 milligram tar under the FTC test method.

Do you recall that?

A. I do.

Q. Okay. And the advertisements were comparing the Carlton cigarettes to other brands such as Marlboro Red King size and Camel and Winston and Kent and Vice Roy each of which were rated at something greater than 10 milligrams tar under the FTC test method.

Do you recall that?

A. I do recall that.

Q. Okay. And using those numbers, just the FTC test method numbers as they were, American Brand—American Brands ran—I'm sorry, American Tobacco Company ran some ads claiming, for example, 10 packs of Carlton have less than one pack of these other brands.

Do you recall that?

A. I do recall that.

Q. And another ad was a whole carton of Carlton had less tar than one pack of these brands, does that—

A. Correct.

Q. —jog your memory?

A. Yes.

Q. And a third ad was 10 to 1, 10 packs of Carlton had less tar than one pack of these brands?

A. Sounds right.

Q. Okay. Now, the FTC decided to bring an action against these ads, correct, against American Tobacco Company, claiming that these ads could not be substantiated and could cause consumer confusion, correct?

A. FTC staff initiated investigation and obtained an agreement and—settlement agreement and the F—the Federal Trade Commission adopted that agreement and published it for comment and finalized it.

Q. Okay. The issue there was American Tobacco Company's presentation of Carlton as a numerical multiple fraction or ratio of the tar of other brands of cigarettes, right?

A. Is that from our complaint?

Q. It is.

A. Okay.

Q. All right Now, in plain English those words meant that the FTC was of the view that it was improper for American Tobacco Company to make a representation that smokers actually would get one-tenth the tar when they smoked Carlton as opposed to another brand, right?

A. That's correct.

Q. Okay. And this was because humans don't necessarily smoke like machines and humans can engage in compensatory smoking behavior when they smoke various brands of cigarettes, right?

MR. KLONTZ: Objection.

A. That's correct. And—and that's not what the—you know, certainly by that point everybody was aware that the FTC numbers do not act as ordinal—don't rank cigarettes—they rank cigarettes in rough order, but they don't—you don't—it's not like you get half as much tar and nicotine from a 5 milligram cigarette as from a 10 milligram cigarette.

BY MR. WAGNER:

Q. Okay. And so through this consent order American Tobacco Company and the guidance that are provided to the industry was that the FTC was proscribing or prohibiting exact numerical representations regarding the actual tar and nicotine that a cigarette would yield when actually smoked, right?

A. If you have a copy of it, I can tell you exactly what we did. But the general thrust of it was to say you can't in your advertisements say or suggest the very point that everybody understands, which is that these are not numerical—when I say everybody, the government and the industry understands that these are not numerical equivalence. That—that the fact that the ratings don't mean that there's 10 times less or 10 times more. That the—you know, the differences are often far less.

Q. And in accordance with that understanding, the FTC was of the view that it would be unfair or deceptive for cigarette manufacturers to state or imply in their advertising that any particular smoker would get any particulate amount of tar and nicotine from a cigarette?

A. Well, what the FTC decides is the particular advertisements is challenging or deceptive or unfair and it decided

that those advertisements were deceptive, unfair, and they said and here's why.

Q. Okay. And—and the why is that the machine yields do not equate with human smoking and smokers can engage in compensatory smoking behavior, correct?

MR. KLONTZ: Objection.

A. And that was deceptive in light of representations that were made in the ad.

BY MR. WAGNER:

Q. And the specific recommendations being made in the ad were that people would get a particular amount of tar and nicotine when they smoked the Carlton cigarettes?

A. That's what we alleged the ad said.

Q. Okay.

A. It was a settlement so American Tobacco did admit that that had happened.

Q. Okay. And the FTC published this consent order, correct?

A. Correct.

Q. And, so, this is another example of an order that can constitute industry guidance so that we can get other industry actors to conform their conduct with FTC policies, right?

MR. KLONTZ: Objection.

A. That's right.

BY MR. WAGNER:

Q. Okay. Now, you're also familiar, are you not, with the practice of certain cigarette manufacturers labeling certain varieties of cigarettes as lights cigarettes?

A. Yes, I am.

Q. Okay. Now, the FTC has—well, the FTC has been aware that cigarette ads and cigarette brand names have used the word "light" as a descriptor, correct?

A. Yes, we have been.

Q. That wasn't a secret, was it?

A. No.

* * *

[Page 587, line 6 through Page 590, line 25]

Q. Do you know whether or not the FTC staff has come to a determination as to whether or not compensation is complete?

A. I don't know—I know the FTC staff has not—would not have come to a determination on that. Whether individual staff members have views on that is something I don't know.

Q. Okay. And just so we can confirm it, I probably asked it before, but in case I hadn't, the proceeding that was initiated by the Federal Register Notice from September of 1997 resulted in the request that the FTC made to the Department of Health and Human Services and that matter is still open, correct?

A. That's correct.

MR. WAGNER: Okay, thank you very much, Mr. Peeler. I'm going to turn the—the table over to Mr. Williams who is going to continue. Thank you very much for hanging in there with the documents.

THE WITNESS: Okay.

MR. WAGNER: I appreciate it.

VIDEO TECHNICIAN: Time is 2:27:08. We're going off the record.—

(Recess taken.)

(Peeler Deposition Exhibit No. 78 was marked for identification.)

VIDEO TECHNICIAN: Time is 2:41:04. We're back on the record.

EXAMINATION BY COUNSEL FOR THE R.J. REYNOLDS DEFENDANTS BY MR. WILLIAMS:

Q. Good afternoon, Mr. Peeler.

A. Good afternoon, John.

Q. As you know we've changed attorneys and as you also know I represent R.J. Reynolds.

During the break when we were changing you indicated something to Mr. Wagner about the line of questioning he had just completed and we thought probably best for you to put that on the record now.

A. That's right. I was—I wanted to clarify to Mr. Wagner that if the Federal Trade Commission had reached a decision that a hundred percent compensation was occurring with respect to smoking, it would not continue the system because there would be no value in it at all. So, you know, the whole issue of how much compensation of what health benefits are is what the Commission's examining now.

Q. It would not continue which system?

A. The tar and nicotine testing system.

Q. Okay.

MR. WILLIAMS: Jeff, do you have any follow-up?

BY MR. WILLIAMS:

Q. All right. Is it all right if we move away from low tar cigarettes for a little while?

A. I was just getting interested in it.

MR. SINGER: What's left?

BY MR. WILLIAMS:

Q. Mr. Peeler, I'd like to start by asking you about how the FTC in its law enforcement capacity goes about monitoring the advertising and marketing practices of the tobacco industry, and during the break I asked you to look at a letter.

Now, the letter is not dated, but it's Exhibit 78 for identification. And it appears to be a letter from Paul Rand Dixon, Chairman of the Federal Trade Commission, to John H. Banzhaf, B-A-N-Z-H-A-F, the III, who is the Executive Director Action on Smoking and Health.

Do you see that?

A. I do see that.

Q. The letter is undated, but it appears to respond to Mr. Banzhaf's letter of July 17th, 1969, and appears to describe the advertising monitor program that the FTC had back in 1969.

Do you see that?

A. Yes, I do.

Q. Okay. For starters, let me ask this, the final page has Mr. Dixon's signature and it states "By direction of the Commission." What does that mean?

A. That means that this is a statement by the Commission that the commissioners would have voted on it.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-8023EALR

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

Appeal from the United States District Court
for the Eastern District of Arkansas

The petition for permission of Lisa Watson, et al., to take an interlocutory appeal pursuant to 28 U.S.C., section 1292(b) has been considered by the court and is granted. The clerk will regularly docket the appeal.

January 28, 2004

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit